(24,303)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 559.

ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JOSEPH SOLOMON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 26, 1915.

1 In the Supreme Court of the State of Ohio.

No. 13964.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
JOSEPH SOLOMON, Defendant in Error.

Petition in Error.

(Filed Dec. 26, 1912.)

The above named plaintiff in error says that at the January term for the year 1912 of the Court of Common Pleas of Mahoning County, Ohio, a final judgment was rendered by said Court of Common Pleas in favor of the above named Joseph Solomon, and against this plaintiff in error, Erie Railroad Company, for the sum of $6500.00, together with costs of suit, in a certain civil action then pending in said Court of Common Pleas wherein the said
2 Joseph Solomon was plaintiff, and this plaintiff in error was defendant. The said judgment was rendered by said Court of Common Pleas on the 27th day of March, A. D. 1912, the same being a day in said January term of court; that subsequently, to-wit, on the 28th day of June, 1912, said plaintiff in error commenced a proceeding in error in the Circuit Court of said Mahoning County, and therein filed its petition in error against this defendant in error for the purpose of reversing said judgment of said Court of Common Pleas, and that at the October term, 1912, of said Circuit Court, to-wit, on the 8th day of November, A. D. 1912, said Circuit Court, in said proceeding in error, rendered its judgment against this plaintiff in error in favor of said defendant in error herein, confirming the judgment and proceedings of said Court of Common Pleas in the above entitled action.

All the original pleadings between the above named parties, and the full record of said action in said Court of Common Pleas, including the bill of exceptions allowed and signed at the trial of said action, together with duly certified copies of the docket and journal entries of said Court of Common Pleas, also duly certified copies of the docket and journal entries and record in said Circuit Court in said proceedings in error are hereto attached, marked "Circuit Court Exhibit A" and made a part of this question in error.

Plaintiff in error avers that there was manifest error in the record and proceedings of said Circuit Court and said Court of Common Pleas, prejudicial to this plaintiff in error, in this, to-wit:

First. Said Circuit Court erred in affirming the judgment of the Court of Common Pleas in said action, and in rendering judgment

against this plaintiff in error when it should have reversed
3 the judgment of said Court of Common Pleas, and rendered judgment against the defendant in error, and in favor of this plaintiff in error.

Second. That said judgment in said Court of Common Pleas was erroneously entered in favor of said defendant in error when it should have been entered for plaintiff in error, and said Circuit Court committed error in affirming said judgment for the following reasons and upon the following grounds:

(*a*) Said Court of Common Pleas erred in overruling the motion of the defendant to the petition of the plaintiff.

(*b*) Irregularities in the proceedings of said Court of Common Pleas by which defendant was prevented from having a fair trial.

(*c*) Misconduct of the prevailing party.

(*d*) That said Court of Common Pleas erred in admitting incompetent evidence offered by plaintiff against and over the objection of the defendant.

(*e*) That said Court of Common Pleas erred in refusing to admit competent evidence offered by the defendant.

(*f*) That said Court of Common Pleas erred in overruling the motion of defendant at the conclusion of plaintiff's evidence to withdraw said case from the jury and direct a verdict in favor of defendant.

(*g*) Said Court of Common Pleas erred in overruling defendant's motion at the conclusion of all the evidence to withdraw said case from the consideration of the jury, and to direct a verdict in favor of defendant.

(*h*) Said Court of Common Pleas erred in charging the jury as requested by plaintiff in writing before argument.

4 (*i*) Said Court of Common Pleas erred in refusing to charge the jury as requested in writing by defendant before argument.

(*j*) Said Court of Common Pleas erred in its general charge to the jury.

(*k*) The amount of the verdict is excessive, appearing to have been given under the influence of passion and prejudice.

(*l*) That the verdict is not sustained by sufficient evidence, and is against the manifest weight thereof.

(*m*) Said verdict is contrary to law.

(*n*) That the judgments of said Common Pleas Court and Circuit Court are not sustained by sufficient evidence, and are contrary to the evidence given at the trial of said cause, and are contrary to law.

(*o*) That said Court of Common Pleas erred in overruling the motion of defendant for judgment on the special findings of fact, and that said Circuit Court erred in denying such judgment.

(*p*) That said Common Pleas Court erred in overruling the defendant's motion for a new trial.

(*q*) That there was error of law apparent upon the face of the record occurring at the trial and excepted to by plaintiff in error.

Wherefore, plaintiff in error prays that said judgment of said Circuit Court and said Court of Common Pleas may be reversed, set

aside and held for naught, and that it may be restored to all things that it has lost by reason of said judgments.

HINE, KENNEDY & MANCHESTER,
Attorneys for Plaintiff in Error.

(Waiver omitted.)

5 Circuit Court.

Petition in Error.

(Filed June 28, 1912.)

The above named plaintiff in error, Erie Railroad Company, for its petition in error says: The above named Joseph Solomon, at the January Term for the year 1912, of the Court of Common Pleas of said Mahoning County, Ohio, recovered a judgment by the consideration of said court against this plaintiff in error for the sum of Sixty Five Hundred Dollars ($6500.00) together with costs of suit, in a certain civil action then pending in said Court of Common Pleas wherein the said Joseph Solomon was plaintiff, and this plaintiff in error was defendant; that said judgment was rendered by said Court of Common Pleas on the 27th day of March, 1912, the same being a day in said January Term of court.

The original pleadings and papers in said action, together with a full record of all proceedings had therein, including the bill of exceptions taken and allowed at the trial of said cause, together with certified copies of the docket and journal entries made in said action in said Court of Common Pleas, are hereto attached, marked "Exhibit A" and made a part of this petition in error.

Said plaintiff in error says that there is error in said action and proceedings in said Court of Common Pleas manifest on said record, and prejudicial to this plaintiff in error, in the following particulars, to-wit:

First. Said Court of Common Pleas erred in overruling the motion of defendant below to the petition of plaintiff below.

6 Second. Irregularities in the proceedings of said Court of Common Pleas by which defendant was prevented from having a fair trial.

Third. Misconduct of the prevailing party.

Fourth. Surprise which ordinary prudence could not have guarded against.

Fifth. That said Court of Common Pleas erred in admitting incompetent evidence offered by the plaintiff against and over the objection of the defendant.

Sixth. That said Court of Common Pleas erred in refusing to admit competent evidence offered by defendant.

Seventh. That said Court of Common Pleas erred in overruling the motion of said defendant at the conclusion of plaintiff's evidence to withdraw said case from the jury, and direct a verdict in favor of the defendant.

Eighth. Said Court of Common Pleas erred in overruling defend-

ant's motion, at the conclusion of all the evidence, to withdraw said case from the consideration of the jury, and to direct a verdict in favor of the defendant.

Ninth. That said Court of Common Pleas erred in charging the jury as requested by the plaintiff in writing before argument.

Tenth. That said Court of Common Pleas erred in refusing to charge the jury as requested in writing by the defendant before argument.

Eleventh. That said Court of Common Pleas erred in its general charge to the jury.

Twelfth. That the amount of the verdict is excessive, appearing to have been given under the influence of passion and prejudice.

7 Thirteenth. That the verdict is not sustaineed by sufficient evidence, and is against the manifest weight thereof.

Fourteenth. That said verdict is contrary to law.

Fifteenth. That the judgment, so rendered by said Court of Common Pleas is contrary to law.

Sixteenth. That said judgment, so rendered, is not sustained by sufficient evidence and is contrary to the evidence given at the trial of said cause.

Seventeenth. That said Court of Common Pleas erred in overruling the motion of defendant for judgment on the special findings of fact.

Eighteenth. That said court erred in overruling defendant's motion for new trial.

Nineteenth. That there was error of law, apparent upon the face of the record, occurring at the trial, and excepted to by plaintiff in error.

Wherefore, plaintiff in error prays that said judgment, so as aforesaid rendered by said Court of Common Pleas in favor of said defendant in error, and against this plaintiff in error, may be reversed, set aside, and held for naught, and that plaintiff in error may be restored to all things which it has lost thereby.

HINE, KENNEDY & MANCHESTER,
Attorneys for Plaintiff in Error.

(Waiver omitted.)

Circuit Court.

Docket and Journal Entries.

June 28, 1912. — Petition in error, waiver, transcript, original papers and Bill of Exception filed.

8 Oct. Term, 1912.

Nov. 8th, 1912. — Hearing; affirmed without penalty at costs of Plff. in error and remanded. J. 6, page 299.

Journal Entries.

J. 6, Page 299, October Term, A. D. 1912, to-wit: Nov. 8th.

The said parties appeared by their attorneys; and this cause came on to be heard upon the petition in error, together with the original papers and pleadings and a duly certified transcript of the orders and judgment of the Court of Common Pleas of Mahoning County, Ohio, in the case of Joseph Solomon vs. Erie Railroad Company and was argued by counsel: Upon consideration whereof the court finds that there is no error manifest upon the fact of the record in said orders and judgment of the said Court of Common Pleas, and in its opinion substantial justice has been done the party complaining as shown by the record of the proceedings, and judgment under review.

It is thereupon considered, ordered and adjudged by this court that the judgment and proceedings of the said Court of Common Pleas in said action be, and the same are hereby in all things affirmed; there being however in the opinion of the court reasonable ground for this proceeding in error no penalty is assessed.

It is further considered and ordered, that the plaintiff in error pay the costs of this proceeding in error, taxed at $—, for which execution is awarded; and that a special mandate be sent to the Court of Common Pleas of Mahoning County, to carry this judgment into execution.

9 To all of which holdings, orders and judgment the plaintiff in error excepts.

(Duly certified.)

Court of Common Pleas.

JOSEPH SOLOMON, Plaintiff,
vs.
ERIE RAILROAD COMPANY, Defendant.

First Amended Petition.

(Filed Sept. 23, 1911.)

Plaintiff after leave of court first had and obtained, files this, his First Amended Petition, and says: defendant now is and on and prior to the 3rd day of June, 1911, was a railroad corporation, duly created, organized and existing under and by virtue of the laws of New York, and engaged in maintaining a line of railway, passing through the City of Youngstown, Mahoning County, Ohio, where it had a certain main and switch tracks; and that one of said switch tracks, known as Number Six (6) track, was located near the plant of Carnegie Steel Company.

Plaintiff says: defendant company on said date caused and permitted said locomotive engine and tender number Seventy-five (75)

to be hauled and used on said switch track; that the coupler on the rear end of said tender—instead of coupling with other cars automatically upon impact, without the necessity of employees of
10 defendant company going between the ends of said tender and cars—would not so couple upon impact with the couplers of other cars, but was defective and inoperative in this, to-wit: that the draw bar of said coupler had such a degree of side play that when it was pushed over to either side of the housing and hangers in which it was fastened it would not squarely meet the couplers of other cars, and would not couple with other cars automatically upon impact,—so that it became and was necessary for employees to go in between the ends of said tender and cars to adjust or swing said drawbar into position to couple with such other cars; and that the knuckle, knuckle pin and lock of said coupler were so rusted, worn and battered that instead of operating freely in response to the cutting lever, operated from the side of said tender, they would bind to such an extent that said knuckle would not open sufficiently to couple with other cars automatically upon impact, but rendered it necessary for employees to go in between said tender and cars to open said knuckle before such coupling could be made.

Plaintiff further says: that on said date he was in the employ of defendant company as a brakeman; that in the course of his said employment it then and there became his duty to couple said locomotive tender to a certain railroad car on said switch track; that said locomotive tender and said car, by reason of said defective and inoperative coupler, failed to couple automatically upon impact, and rendered it necessary for this plaintiff to go between said locomotive tender and car to open said knuckle and adjust said coupler, as aforesaid; that when this plaintiff attempted so to do his left foot, ankle and leg became caught between said locomotive tender and car, crushing it so that it had to be amputated about three inches above the ankle thereof.

11 Plaintiff further says: that his said injuries were the direct and proximate result of the gross negligence and carelessness of defendant company, in this, to-wit:

First. In causing and permitting said locomotive tender to be hauled or used when said coupler was defective and inoperative and could not be coupled automatically by impact without the necessity of plaintiff going between the ends, as aforesaid;

Second. In failing and neglecting to have a coupler on said tender that could be coupled automatically upon impact without the necessity of plaintiff going between the ends, as aforesaid.

Plaintiff further says: that he was at all times in the exercise of ordinary care on his part; that at the time of sustaining said injuries he was 30 years of age, earning and able to earn $90.00 per month; that by reason of said injuries he has suffered great physical pain and mental anguish, and that he will continue so to suffer as long as he lives; that his injuries are permanent, and that he has been incapacitated from earning a living.

Wherefore, plaintiff says: that by reason of the premises he has been damaged in the sum of Thirty Thousand ($30,000.00) Dollars,

for which, together with interest and costs, he prays judgment herein against defendant company.

JOSEPH SOLOMON,
By EMIL J. ANDERSON,
BLAKE C. COOK,
I. G. MATHEWS, AND
CHARLES B. COOK,
Attorneys for Plaintiff.

(Duly verified.)

12 Court of Common Pleas.

Answer to First Amended Petition.

(Filed Nov. 14, 1911.)

Now comes Erie Railroad Company, defendant in the above entitled action, and by leave of court first had and obtained, files this its answer to the First Amended Petition of plaintiff herein, and says: it admits that it is, and at the various times in said petition stated was a corporation, engaged in operating a line of railway passing through the City of Youngstown, Ohio, and that in connection therewith there are and were certain main and switch tracks; that plaintiff on or about the time in said petition stated was engaged in its employ as a brakeman, and was at or about a track located near the plant of the Carnegie Steel Company. Further answering, defendant admits that at or about said time plaintiff sustained certain injuries to his left leg by reason of same being caught and crushed, so that a portion of the same was thereafter amputated, but defendant denies that said accident occurred in the manner, or was produced by the causes in said amended petition stated; and further answering defendant denies each and every allegation, statement and averment in said amended petition contained, except as hereinbefore expressly admitted to be true.

Further answering defendant says that if it was in any manner guilty of negligence in the premises, then plaintiff himself was guilty of negligence, inattention and lack of care, directly contributing to produce said accident and injuries; in failing to look where he was going, or how he was stepping or placing his foot; in failing

13 to perform his duties as brakeman in a careful, safe and proper manner; in violating the rules of this defendant, promulgated for the safety of plaintiff and other employees and for the proper performance of the work in hand; and in carelessly and heedlessly putting his foot in such a position that it could be and was injured as aforesaid, when in the exercise of due care for his own safety he could have performed his work in a proper manner without injury to himself.

Further answering defendant says that it is in no manner liable to plaintiff, and having fully answered prays that it may be dismissed hence with its costs.

HINE, KENNEDY & MANCHESTER,
Attorneys for Defendant.

(Duly verified.)

Court of Common Pleas.

Reply.

(Filed Nov. 16, 1911.)

Plaintiff for reply to answer of defendant company filed herein, says: he denies each and every statement, allegation and averment in said answer contained that are not admissions of the allegations of plaintiff's petition.

JOSEPH SOLOMON,
By ANDERSON, COOK, MATHEWS & COOK,
His Attorneys.

(Duly verified.)

14 Court of Common Pleas.

Motion for Judgment on Special Findings of Fact.

(Filed Jan. 30, 1912.)

Now comes Erie Railroad Company, defendant in the above entitled action, and moves the court for an order to give and enter judgment in the above entitled action for the defendant, notwithstanding the general verdict returned herein, upon the ground and for the reason that the special findings of fact rendered by the jury, are inconsistent with the general verdict as follows:

Said jury, as shown by said special findings of fact, has found:

First, that at the time of the accident to plaintiff, plaintiff could open the knuckle solely by reason of the cutting lever; and,

Second, that at the time of the accident to plaintiff, it was not necessary for him to open the knuckle by hand.

Both of which special findings of fact are inconsistent with the general verdict in said action.

HINE, KENNEDY & MANCHESTER,
Attorneys for Defendant.

Court of Common Pleas.

Motion for New Trial.

(Filed Jan. 30, 1912.)

Now comes Erie Railroad Company, defendant above named, and asks the court for an order to set aside and vacate the verdict of the jury returned in the above entitled action, and grant
15 it a new trial herein for each and all of the following causes affecting materially its substantial rights.

First. Irregularity in the proceedings of the court by which the defendant was prevented from having a fair trial.

Second. Misconduct of the prevailing party.

Third. Surprise which ordinary prudence could not have guarded against.

Fourth. That the court erred in admitting incompetent evidence against and over the objection of the defendant.

Fifth. That the court erred in refusing to admit competent evidence offered by the defendant.

Sixth. That the court erred in overruling the defendant's motion to direct a verdict in favor of it at the conclusion of plaintiff's evidence.

Seventh. That the court erred in overruling the defendant's motion to direct a verdict in its favor at the conclusion of all the evidence.

Eighth. That the court erred in charging the jury as requested by the plaintiff in writing before argument.

Ninth. That the court erred in refusing to charge the jury as requested in writing by defendant before argument.

Tenth. That the court erred in its general charge to the jury.

Eleventh. That the amount of the verdict is excessive appearing to have been given under the influence of passion and prejudice.

Twelfth. That the verdict is not sustained by sufficient evidence, and is against the manifest weight thereof.

Thirteenth. That the verdict is contrary to law.

16 Fourteenth. Error of law occurring at the trial and excepted to by the defendant.

HINE, KENNEDY & MANCHESTER,
Attorneys for Defendant.

Common Pleas Court.

Docket and Journal Entries.

Damages.

May Term, A. D. 1911.

June 14th, 1911. Petition and precipe filed. Summons issued.

June 26th, 1911. Summons returned and filed endorsed; Received this writ, June 14th, A. D. 1911, and pursuant to its command on the same day, I notified the within named defendant Erie Railroad Company, by delivering to G. D. Hughes, a regular ticket agent for said defendant company at Youngstown, Ohio, a true and certified copy thereof with the endorsements thereon, after having made diligent search for and being unable to find the President, Secretary, Treasurer, Clerk or any other chief officer of said defendant company within said county. George W. Turner, Sheriff. By A. L. Bell, Deputy. Fees $1.75.

Continued.

Sept. Term.

Sept. 9th, 1911. Motion filed.
Sept. 23, 1911. First amended petition filed.
Sept. 25, 1911. Motion of Def't overruled. Def't excepts and has leave to answer by Sept. 30th. J. 104A, Page 124.
17 Nov. 14, 1911. Leave to file answer instanter. J. 104B, Page 135.
Nov. 14, 1911. Answer to first amended petition filed.
Nov. 16, 1911. Reply filed.

Continued.

Jan. Term.

Jan. 24, 1912. On trial to jury; jury sworn, etc. J. 105A, Page 87.
Jan. 25, 1912. On trial to jury; trial continued. J. 105A, Page 89.
Jan. 26, 1912. On trial to jury; trial continued. J. 105A, Page 95.
Jan. 27, 1912. On trial to jury; verdict for Pl'ff for $6500.00 and special verdict. J. 105A, Page 101.
Jan. 27, 1912. Verdict and special verdict filed.
Jan. 30, 1912. Motion for judgment on special findings of fact filed.
Jan. 30, 1912. Motion for new trial filed.
Mar. 26, 1912. Motion of Def't for judgment on finding of fact overruled. Def't excepts. J. 105A, Page 277.
Mar. 27, 1912. Motion for new trial overruled. Def't excepts. Judgment on verdict for Pl'ff vs. Def't for $6500.00 and costs. Def't excepts and has 40 days to file Bill of Exceptions. J. 105A, Page 280.
May 4th, 1912. Bill of Exceptions filed.
May 16th, 1912. Bill of exceptions transmitted to Hon. Wm. P. Barnum, Trial Judge.
May 16th, 1912. Bill of exceptions received again by clerk and filed.

18 *Journal Entries.*

J. 104 A, page 124, Sept. Term, A. D. 1911, to-wit: Sept. 25th,
This day this cause comes on for hearing upon the motion of the defendant to the petition of the plaintiff filed herein.
On consideration thereof the court overrules the same. Defendant excepts and has leave to answer by Sept. 30th.
J. 104 B, page 135, Sept. Term, A. D. 1911, to-wit: Nov. 14th,
Defendant has leave to answer instanter.
J. 105 A, page 101, Jan. Term, A. D. 1912, to-wit: Jan. 27th,

This day come the parties by their attorneys; also come the Jury heretofore impaneled and sworn who retire to their room in custody of the Sheriff for deliberation, and after due deliberation return into open Court and return their verdict in writing, signed by their foreman, to-wit:

We, the jury in the above entitled cause, find the issues joined by the pleadings for the plaintiff, and assess his damages at $6500.00.

F. W. BANKS, *Foreman.*

$6500.00.

And in response to the questions propounded to us, we return the same with our special findings thereon as follows:

At the time of the accident to plaintiff was the draw-bar in such condition as necessitated plaintiff to line up the draw-bar
19 before a coupling could be made? Yes.

F. W. BANKS, *Foreman.*

At the time of the accident to plaintiff, could the plaintiff open the knuckle solely by reason of the cutting-lever? Yes.

F. W. BANKS, *Foreman.*

At the time of the accident to plaintiff, was it necessary for plaintiff to open the knuckle by hand? No.

F. W. BANKS, *Foreman.*

J. 105 A, Page 277, Jan. Term, A. D. 1912, to-wit: Mar. 26th.

This day this cause came on to be heard on the motion of the defendant for judgment on special findings of fact, and the court having heard the arguments of counsel and being fully advised in the premises overrules the same, to which ruling of the court the defendant then and there excepts.

This judgment is this day entered as of and for the 26th day of March, 1912.

J. 105 A, Page 280, Jan. Term, A. D. 1912, to-wit: Mar. 27th.

This day this cause comes on for hearing upon the motion of the defendant to set aside the verdict of the jury heretofore entered herein and to grant a new trial.

On consideration thereof the court overrules the same. Defendant excepts.

It is therefore considered by the court that the plaintiff recover from the defendant the said sum of sixty five hundred dollars, the amount of the verdict heretofore entered herein together with his costs herein expended and the defendant pay its own costs.
20 To all of which the defendant excepts and is allowed 40 days from and after this date in which to prepare and file its Bill of Exceptions herein, which when so prepared and filed shall be part of the record herein, but not be recorded.

(Duly certified.)

Court of Common Pleas.

Bill of Exceptions.

Be It Remembered, that at the trial of the above entitled cause, at the January term of the Court of Common Pleas, Mahoning County, Ohio, to-wit: beginning on the 24th day of January, 1912, and continuing from day to day thereafter as hereinafter noted, before the Honorable William P. Barnum, Presiding Judge, and a jury of twelve men, the above appearances being made on behalf of the parties, the plaintiff to maintain the issues on his part to be maintained, called the following witnesses and introduced the following evidence, to-wit:

The plaintiff JOSEPH SOLOMON offered himself as a witness to testify in his own behalf, and being first duly sworn, testified as follows:

Direct examination.

By Mr. ANDERSON:

Q. Your name is Joseph Solomon and you are plaintiff in this case?
A. Yes, sir.
21 Q. How old are you?
A. Thirty-one.
Q. Where do you live?
A. 122 North Pearl.
Q. How long have you lived in Youngstown?
A. All my life.
Q. What were you earning per day at the time of your injury?
A. $3.40.
Q. As railroad brakeman?
A. Yes, sir.
Q. For the Erie Company?
A. Yes, sir.
Q. How long had you worked for the Erie?
A. Sixteen months.
Q. What was the date of your injury?
A. Second of June.
Q. And about what time of day?
A. About 2:30.
Q. Where was it?
A. Lower mill of the Carnegie plant.
Q. Lower mill of the Carnegie plant?
A. Yes, sir.
Q. What kind of an engine were you using?
A. Switch engine.
Q. Give the number of it?
A. Seventy-five.

Q. Tell the jury the names of the engineer and fireman if you can?

A. I don't know the fireman but the engineer's name was John Mulvihill. The fireman I didn't know his name.

Q. Who was the conductor of your crew?

A. Jenkins.

Q. And who was the other brakeman?

A. McFadden.

Q. So that Jenkins,—the conductor,—McFadden, and yourself was the train crew?

A. Yes, sir.

22 Q. How long had you worked with that particular engine, before your injury?

A. Oh well I might have worked with it before but I only worked one day that day.

Q. What time did you go to work in the morning?

A. Nine o'clock.

Q. Where did you take the engine that morning?

A. Took it in to the lower mill.

Q. Where did you get upon it?

A. Holmes Street.

Q. On that morning what work did you perform with that engine?

A. Why we switches Dalzell's, Sandusky Brewing Company, and Schlitz.

Q. Dalzell's, Sandusky Brewing Company, was that the name?

A. Yes, sir.

Q. And Schlitz, those are side tracks are they, Mr. Solomon?

A. Yes, sir.

Q. Were you front or rear brakeman or how were you designated?

A. I was what they call head brakeman, following the engine.

Q. I didn't understand.

A. I was what they call head brakeman, following the engine.

Q. That morning tell the jury whether or not you made any observation of the coupler of the tender or whether or not you worked with it?

A. I don't understand you.

COURT: Did you look at it, did you see it?

A. Yes, sir.

Q. Did you see the coupler on the tender?

A. Yes, sir.

23 Q. Did you attempt to switch any cars with it that morning or the forenoon?

A. Yes, sir, in Schlitz's.

Q. Tell the jury what occurred at Schlitz's and what you observed with reference to the coupler and drawbar?

A. Well when I went into Schlitz's, just like Mr. Manchester explained to you, when I went into Schlitz's to get the knuckle open, jerking upon that lever, the lever couldn't open. I had to either open it with my hand or kick my foot and open it.

Q. Now what is the purpose of the lever that you speak of?
A. It is supposed to open that knuckle automatically.
Q. And from what point, from the side of the tender or how?
A. Well just about—it don't run out to the side.
Q. How far from the side?
A. Well about a foot.
Q. Tell the jury whether you are able to open the knuckle providing it is in good working order, from the side of the tender, providing it is in good working order?
A. Yes, sir, you can open it.
Q. And is that the purpose of the cutting lever?
A. Yes, sir.
Q. Now in Schlitz's, or making this switch in Schlitz's what did you do?
A. I had to open it with my hand.
Q. Why did you have to open it with your hand?
A. Well either the knuckle in the drawbar was too loose and chain was too long and handle, the cutting lever what we call was bent so that it didn't pull the length of the chain and that wouldn't open the knuckle.

24 Q. And then in order to couple with the other car what did you do,—tell the jury in your own language?

A. Well I had to use my hand to open the knuckle. That was all that I done at Schlitz's. That was done at Schlitz's.

Defendant objected.

COURT: The expression "I had to" is only an indication of his belief in the matter which is not competent.

Q. Now you say that there was one other time that morning that you made observations of the coupler knuckle?
A. Yes, sir.
Q. And tell us, Mr. Solomon, where that was and what you were doing?
A. Well that was right out when we were switching Schlitz's. I think we were going to turn the cars around. I think we were either setting an empty out or setting a load back, turning them around they call it anyhow. When I went up on what they call the "hill" to take hold of the car she missed there once.
Q. Explain to the jury what you mean by "missed?"
A. When they come together she didn't couple.
Q. By missing did the drawbars meet squarely or how,—just explain it in your own way?
A. Well I couldn't say as to whether they met squarely or not. I was standing alongside of it, you know, and when the engine came back again it she shoved the car away. She didn't couple up.
Q. And what did you do if anything in order to enable you to make a coupling,—what did you then do?
A. I pulled away from the car till the car run down on the level and it stopped and he pulled up a little and I gave him a signal and he came back again and coupled up.

25 Q. What if anything did you do in the meantime to the coupler?

A. Well I shoved the drawbar over.
Q. How?
A. With my foot.
Q. Did I understand that that was before lunch?
A. Yes, sir.
Q. After dinner then you went into the lower mills?
A. Yes, sir.
Q. How long were you there and what were you doing before the accident?
A. Well this was about the second move after dinner.
Q. And what was that second move to be?
A. Why we were on the scale track and we were going to go over on the six inch to take hold of C. I. & S. car.
Q. Who, if any one, instructed you to go over and get that C. I. & S. car?
A. The conductor.
Q. Where was the conductor?
A. The three of us was right there together at the scale shanty.
Q. In order to go and get that C. I. — S car what was it necessary to do?
A. We went on that scale track to where the switch is and throwed the switch over and started back after that car.
Q. When you started back after that car about how far away was that car standing?
A. About a car length and a half.
Q. What?
A. About two car lengths,—a car length and a half.
Q. And where was the conductor at that time?
A. Well I don't just exactly remember now where he was.
Q. And what did you do?
A. I throwed the switch over and backed up towards the car.
26 Q. And then did you mount the,—
A. Stepped on the footboard.
Q. Now as you approached that other car tell the jury in your own words without being questioned what you observed,—what you observed with reference to the knuckle and the drawbar and what you did?
A. Well when I went up there after that car I throwed the switch over and then I -as about five or six yards away, maybe seven, away from the footboard—that engineer had a fashion of pulling a little over the switches—and I gave him a signal to back up and I stepped on the footboard and when I stepped on the footboard I didn't just turn right around, you know, stood on there maybe five or six, maybe seven or eight seconds,—turned around and looked at the drawbar and she was closed. I looked at the one on the car and it was open. Well I went to open this here coupler on the tender of the engine with the cutting lever and I jerked it three or four times and she wouldn't open. She just kind of,—just moved,—jerked it again and she would move a little, then,—well I was getting so close then,—now whether the jerking on this or not fetched the drawbar

over to me or not I don't know but she was clear over and when I got so close that I could see them coming together I seen she was out of line and I stuck my foot up to kick it over and just as I was about half ways over my foot slipped off and went in between them when they came together.

COURT: Which foot?

A. Left.

27 Q. Where was your left foot off,—where was it amputated?

A. Why right up there (indicating) about half ways between the ankle and the knee.

Q. Can you give us accurately where it is taken off or about half way is that your best judgment,—about how many inches from the knee?

A. Well I couldn't tell that.

Q. You can measure it so as to let us have it for the record after lunch?

A. Yes, sir.

Q. Where was the engineer, or where was the conductor?

A. I think the conductor was about a car length away from me.

Q. Then where were you taken and by whom, where were you taken what did you do after your foot was crushed?

A. Stepped off the footboard and stepped on this one and fell down and picked myself up and sat on the rail. I sat there for four or five minutes and they came along,—Jenkins and Mulvihill got hold of me and carried me up as far as, in front of Smith's brewery and when they came with the Carnegie Steel Company's stretcher and carried me over to the emergency hospital and from there I went on the Red Cross ambulance to the hospital.

Q. At the hospital you may tell the jury whether or not your leg was amputated?

A. Yes, sir, it was amputated.

Q. How long were you confined to the hospital?

A. Five weeks and three days if I recollect right.

Q. Since that time where have you been?

A. I have been at home with my mother-in-law.

Q. With whom?

A. With my mother-in-law.

Q. Have you as yet been able to perform any work?

A. No,sir.

28 Cross-examination:

By Mr. MANCHESTER:

Q. Mr. Solomon, are you wearing an artificial foot?

A. Yes sir.

Q. How long have you been wearing it?

A. Well if you will let that go till this afternoon I will tell you that too.

Q. Well can you tell approximately?

A. Well I have been wearing it about,—well I judge a little over two months. Now I wouldn't say for sure.

Q. You say you went to work the morning of the accident about nine o'clock?

A. Yes, sir.

Q. Had you ever worked on engine seventy-five before?

A. Well I suppose I had but not to my knowledge, not that I can recollect now.

Q. What work had you been doing, on what crew had you been working prior to the time of your accident?

A. Well you see I was on the extra list,—working all over. I don't know just where I had been.

Q. You might have been working with this engine, you don't know, you couldn't say whether you had ever worked with this engine before or not?

A. Well, I don't know whether I worked on the upper mill with that engine or not.

Q. You had switches at the upper mill?

A. Yes, sir.

Q. For how long?

A. Oh different stretches of time. Maybe a week,—maybe two weeks, maybe three, maybe I would only be up there for a day sometimes.

29 Q. That was during these sixteen months that you worked for the Erie, all of your time you spent as extra brakeman?

A. No, sir. I have held a regular job on the Erie.

Q. Well how long had you worked as extra brakeman and done the kind of work you were doing this morning when you were hurt?

A. I couldn't say.

Q. Are you able to tell approximately how many times you had switched at the Union works?

A. How many times I had switched there?

Q. Yes, how many times you had been on the crew which had done switching work around the lower mills, or upper mills whichever it was?

A. Well I worked down there one time I think I held the job one time.

Q. What is it?

A. I think I held that job one time.

Q. Regularly?

A. Yes, sir.

Q. Do you know for how long?

A. About two months.

Q. Do you know what engine you used then?

A. No, I don't.

Q. When was it?

A. Well I can't tell that either.

Q. Now you say you went to work the morning of the accident about nine o'clock?

A. Yes, sir.

Q. And you took your engine at Holmes St.?

A. Yes, sir.

Q. That is the customary place for taking the engine?
A. (No response.)
Q. And what do they call this crew with which you worked?
A. The lower mill crew.
30 Q. And its business was to do switching, was it not?
A. In the lower mill.
Q. And at these other places you have spoken of?
A. Yes,sir.
Q. Where was the first place that you went from Holmes St.?
A. Into the lower mill, and I think we went up and switched Dalzell's, I ain't sure.
Q. Switched Dalzell's first?
A. I think so.
Q. Do you recall what switching you did there?
A. No, sir. That was the morning work in there. That was the first thing that you do would be to go up there and switched everything ahead of you up there like the brewery or Dalzell's.
Q. Did you take any cars up with you from Holmes Street?
A. No, sir. We went up there light.
Q. You know you did some switching at Dalzell's but you are not able to tell just how much?
A. Well I wouldn't say for positive fact that we done any, maybe we did and maybe we didn't.
Q. Well I am asking you for your recollection, I don't know myself,—are you able to tell whether you did any switching up there?
A. Well I kind of think we did.
Q. What kind of cars?
A. Box cars.
Q. Have you any idea how many?
A. No.
Q. You didn't have any trouble with your switching there?
A. No, sir.
Q. And when you wanted to couple on cars or when you wanted to uncouple from cars you did it, I believe, you say, by using this lever which extends out to the side?
A. Yes, sir.
31 Q. And all the switching at Dalzell's was done that way?
A. Yes, sir.
Q. And you noticed nothing wrong with the coupler there?
A. Not that coupler.
Q. Where was the next place you switched?
A. Switched at Schlitz's.
Q. What switching did you do there?
A. Turned the cars around.
Q. How many were there?
A. Three.
Q. And by turning around what do you mean?
A. Put the head one in behind or I don't know just exactly whether we turned them that way or not but I know,—I kind of

think we were taking an empty out and placing a load or placing an empty for loading.

Q. Is that the place where you say you noticed something wrong with the coupler?

A. Yes, sir.

Q. How many cars had you switched before you noticed this difficulty?

A. The first move that I made.

Q. Just tell the jury what that was?

A. Why I went to pull the lever to open the knuckle and it wouldn't open and I had to either take my hand or my foot and kick the knuckle over.

Q. Did you have hold of that car then?

A. No, sir.

Q. You were just getting ready to couple onto that car?

A. Yes, sir.

Q. And you say you took hold of the lever and the knuckle didn't open?

A. Yes, sir.

Q. Now that was the first thing you noticed there was anything wrong, the first time there was anything wrong?

A. Yes, sir.

32 Q. And I believe you stated that you couldn't tell just what the trouble was but either the knuckle was too loose or the chain was too long or the handle was bent, some one of those things?

A. Them three things was the matter with it.

Q. Oh all of those things?

A. Yes, sir.

Q. By the handle do you mean this cutting lever?

A. Yes, sir.

Q. How many times did you pull on this lever before you noticed it didn't work?

A. Why the first time I pulled on it it wouldn't work.

Q. And was your engine standing still or moving?

A. No, sir, I was coming back toward the cars all the time.

Q. The engine was moving all the time?

A. Yes, sir.

Q. You were riding on the footboard?

A. Yes, sir.

Q. And when did you first find out just why it was that the knuckle wouldn't open?

A. Why when the knuckle wouldn't open I never just got right down to it and looked at it.

Q. Yes, I know but I am asking you then when it was or how it was you discovered just what was the matter?

A. Well there was something the matter with that knuckle it wouldn't open when I had to use my hand.

Q. Well is that the way you came to the conclusion that the

pin was bent, merely from the fact you had to use your hand,—you didn't get down and look at that pin?

A. No, sir.

33 Q. Or at the chain?

A. You could see the chain was too long.

Q. How many links was there in it?

A. I will never tell you.

Q. How long ought it to be?

A. Ought to be long enough to pull the pin clean out past the knuckle.

Q. How long would that be in inches?

A. I can't say.

Q. Are you able to tell how many inches long this chain was, approximately I mean?

A. No, sir.

Q. How far were you from this car when you first noticed that the coupler didn't open?

A. Oh maybe eight or ten feet.

Q. Your engine was moving down towards the car all the time?

A. Yes, sir.

Q. How fast?

A. Fast as you could walk.

Q. And so it would take about how many seconds for it to cover that eight or ten feet?

A. Oh I don't know.

Q. Well at any rate within that space of time while your engine was running at that speed, was covering those eight or ten feet, you noticed this chain was too long,—you saw the chain was too long?

A. Yes, when I pulled the chain.

Court here suspended until 1:00 P. M., of the same day, to-wit, January 24th, 1912, at which time the trial of this case was continued as follows:

Q. Now when you moved the chain as you say did you take hold of this cutting lever and lift upon the handle?

A. Yes, sir.

Q. How high up did you lift it?

A. As high as it would go.

34 Q. How high would that be?

A. Well I don't know.

Q. What prevented it from going higher?

A. Why the pin. The chain was on the pin and when you pulled it up you pulled it up as high as it would go.

Q. What prevented it from going any higher?

A. The length of the chain.

Q. Well was the chain stretched tight?

A. Yes, sir.

Q. The handle could still have moved up further had the chain been longer?

A. Yes, sir.
Q. Had the chain been longer you could have moved the handle up higher?
A. If the chain had been longer?
Q. Yes.
A. (No response.)
Q. What I want to get at is this. You say you pulled it out as high as you could?
A. Yes, sir.
Q. And you say it was the pin that stopped it from going any higher?
A. Well, I don't know.
Q. Well what was it?
A. Why yes it was the pin that stopped it from coming any higher.
Q. Now just how was it that the pin prevented it from coming any higher?
A. Why being up again,—on the inside, the pin on the inside.
Q. What did the pin strike against?
A. The top of the drawbar on the inside.
Q. That is the way it is made?
A. On the inside.
Q. That is the way the coupler is made is it? That the pin can only come up as high as the top of the drawhead?
A. Yes, sir.
Q. That is what stopped the pin from coming up higher this time, was it?
A. Well I couldn't say.
Q. What is it?
A. I couldn't say whether it was the pin or not.
Q. Well do you know what is the reason it didn't come up any higher?
A. Well I know that I pulled the lever up and jerked on it as far as I could get it and the knuckle just moved. Now I don't know whether you would blame that on the pin or not.
Q. Well, did you see the pin?
A. You can't see the inside from the outside.
A. You couldn't see that the pin was bent could you,—couldn't see the pin at all?
A. No, sir. Not from where I stood.
Q. You didn't see the pin at any time did you?
A. Yes, sir.
Q. Before you tried to make this?
A. No, sir, after.
Q. When was that?
A. Well that was about, oh I don't just remember the date.
Q. Well about when?
A. About three months ago.
Q. Where did you see it?
A. At Holmes Street.

Q. Same coupler was still on the engine?
A. It looked the same to me.
Q. You were still using it on that same engine, number 75?
A. Yes, sir.
Q. That was about three months ago?
A. Yes, sir.
Q. The engine was then standing up at Holmes Street ready to go out and do switching?
A. Yes, sir.
Q. Well now Mr. Solomon, are you able to tell why it was that you couldn't pull this lever any higher? You say you
36 noticed the length of the chain. First you said the pin was stuck, then you said you couldn't tell whether it was or not. Now can you tell why you couldn't pull that lever any higher?
A. Because the lever, in the middle of the cutting lever where the chain was on was sagged in, down.
Q. What do you mean by sagged down?
A. Why it was bent.
Q. Let me hand you this photograph marked "Defendant's Exhibit number one" and will you kindly indicate what part of the cutting lever was bent or sagged down as you say?
A. (Witness marks on photo.) I don't know whether you can see that or not.
Q. That part of the cutting lever right in front of the row of rivets in the middle of the tank?
A. Yes, sir.
Q. Was it about in the same shape that it is in as shown by this photograph?
A. That depends on where the photograph was taken from.
Q. Well I am asking you what the fact is?
A. It was more bent than it shows there.
Q. It was bent more than that?
A. Yes, sir.
Q. Right at that point where this chain is?
A. Yes, sir.
Q. About how much more would you say that was bent down?
A. I couldn't say.
Q. Well would it be an inch?
A. Yes, sir, it might be an inch and might be a little more.
Q. Would it be as much as two inches?
A. I couldn't say that.
37 Q. Well would you say that it wouldn't be any more than two inches?
A. Oh about that.
Q. Now you say that,—the fact that that cutting lever was bent down was the reason why you couldn't raise the pin any higher, is that correct?
A. The reason because that was sagged, that couldn't——
Q. Yes, is that the reason why you couldn't lift the pin any higher?
A. Well that I don't know.

Q. What?
A. I couldn't say.
Q. Well Mr. Solomon, can you tell why it was that you couldn't open the knuckle?
A. Why because the cutting lever wouldn't open it.
Q. Well do you know why it wouldn't open it?
A. No, not exactly.
Q. First you say the pin stuck and then you say this was bent down. Now can you give the reason?
A. Well now I will tell you. In the inside of that drawbar there is a tongue there that shoves that knuckle open, supposed to shove it open wide from the side of the tank and if you take that cutting lever and it is in good order and raise that up, that knuckle will throw open. Well when you do that with that knuckle it won't open.
Q. Now I am asking you why wouldn't it open at this time that you speak of, are you able to tell? You told us first that the pin would catch. Then you said this cutting lever was bent. Now what was the reason or do you know at all? What I want to get at is what was wrong with this coupler that you couldn't open it?
A. Why the knuckle in it for one thing was loose.
38 Q. Well but what else, now the knuckle was loose. First the pin caught; then the cutting lever was bent, and then the knuckle was loose, now what else was wrong with it?
Mr. ANDERSON: Are you speaking about Schlitz's or generally?
Q. I am talking about the time he said he was riding up on that track and he said he couldn't open it. I am asking you to tell what the condition of that coupler was. I don't care when he learned that condition.
A. Well the knuckle certainly must have been wore out.
Q. I know it must have been but what fact do you know about it?
A. I know that it wouldn't open.
Q. And now what was wrong with it? What particular part of the coupler was out of repair so that it wouldn't open?
A. It must have been the knuckle or the pin was bent.
Q. Well did you see the pin was bent?
A. Oh I couldn't say that I did.
Q. Well do you know that there was anything wrong with the knuckle?
A. I knew that the knuckle wouldn't open by pulling the cutting lever.
Q. Do you know of anything that was wrong with it except that it wouldn't open?
A. Yes, sir, and it was worn out.
Q. Where?
A. Why the knuckle was either too small or the drawbar or the pin was wore, one of the two.
Q. Well did you notice either of them,—did you look at either of them to see?
A. Not then I didn't.
Q. Well did you at any time?

A. Yes, afterwards.

39 Q. Well which did you find?

A. I found that you could take that knuckle and just shake it.

Q. But which was it, was the pin worn or was the knuckle worn or what wrong?

A. Well the knuckle was too small, it must have been worn.

Q. Well it must have been, did you notice whether it was worn or whether that was the way it was made?

COURT: Mr. Manchester's point is this: do you say to yourself that so and so was true and therefore this must be true? Do you reason it out or are you stating your conclusion from facts, things that you saw and felt?

A. That is one thing that I saw, that that knuckle was too loose in that drawbar.

Q. Did you measure the amount of play that it had?

A. No, sir.

Q. How much play would you say that it did have?

A. Well I couldn't say that.

Mr. ANDERSON: Are you talking about the knuckle or the drawbar?

A. The knuckle was too loose.

Q. Just indicate if you will where the knuckle was too loose on this same photograph?

A. The knuckle was too loose right in here where the pin drops through it and right on top here.

Q. Where the pin goes through it that hole was too big?

A. This is on top of the knuckle.

Q. What is it?

A. On top of the knuckle.

Q. Whereabouts on top of the knuckle?

A. Right where the pin goes down there is a little space.

40 Q. And that opening down through there you think was too large or was the pin too small?

A. I didn't notice the pin because I just shook the knuckle back and forth and it was loose.

Q. You saw the knuckle was loose but you don't know whether the hole in the knuckle was too big or the pin was too small, is that right?

A. That is correct.

Q. When did you notice that?

A. About three months ago.

Q. The engine was standing up there then at Holmes Street and you went up for the purpose of looking at it to see if you could find something wrong with it?

A. I went up there to examine it.

Q. Your lawsuit was pending then?

A. Yes, sir.

Q. And you wanted to see if you couldn't find something wrong with that coupler didn't you,—that was your purpose?

A. I went up there to look at it, yes, sir.

Q. To see if you couldn't find something wrong with it,—wasn't that the purpose?
A. I knew there was something wrong with it.
Q. But you went up to see what the particular thing was that was the matter with it, didn't you?
A. Yes, sir.
Q. And you took hold of that knuckle and shook it and you found it was loose?
A. Yes, sir.
Q. The engine was standing still?
A. Yes, sir.
Q. How long were you there?
A. About ten or fifteen minutes.
Q. And yet you didn't look at that knuckle to see whether the hole in it was too big or whether the pin was too small is that the fact?
A. Yes, sir.
41 Q. When you went there for the specific purpose of finding out what was wrong with it?
A. Yes, sir.
Q. Did you find anything else wrong with it?
A. Just like I said, the cutting lever was bent.
Q. That was three months ago?
A. No, it was bent all the time I was working with it.
Q. I mean this, three months ago was it bent then?
A. Yes, sir.
Q. Just like it was bent when you were hurt?
A. Yes, sir.
Q. What else was wrong with it?
A. Well there was too much side play.
Q. What do you mean by that?
A. I mean there was that much there that it would pass the other knuckle going to couple up.
Q. Where was this side play?
A. In the collar.
Q. You mean by that that hanger in the end sill?
A. The hanger where she fits into the tank.
Q. Where the drawhead fits through?
A. Yes, sir.
Q. Did you measure that?
A. No, sir.
Q. That was three months ago when you went up there to look the engine over?
A. Yes, sir.
Q. You saw there was that much but you didn't measure it?
A. I saw it measured.
Q. And do you know what it is?
A. Yes, sir.
Q. How much?
A. Two and one-half inches.
Q. That was the total side play?

A. At the collar.
Q. Well, Mr. Solomon, you have been in the railroad business for some time, haven't you?
A. Yes, sir.
42 Q. Did you ever see a coupler of any kind that didn't have some side play at the collar?
A. I saw them pretty tight.
Q. I know, but did you ever see a coupler that didn't have side play at the collar?
A. No, it had some.
Q. And what would you say was the ordinary or average side play at the collar?
A. About three-quarter inches.
Q. The total side play?
A. Yes, sir.
Q. Was three-quarter inches?
A. It might be an inch.
Q. Isn't it a fact, Mr. Solomon, that the standard is two and one half inches or do you know anything about the standard?
A. I don't know anything about the standard.
Q. Did you ever measure any couplers at all, measure the side play?
A. No, sir.
Q. You were just examining, you say it might have been as much as how much?
A. About an inch.
Q. Well you have seen some a great deal more than that haven't you?
A. No, I haven't.
Q. What is it?
A. No, sir.
Q. Never saw one with more side play than an inch?
A. I have on the Erie, yes, sir.
Q. I know, on the Erie or any place?
A. Any other place, I never did.
Q. How much side play did you see on some of them there?
A. Well, about an inch.
Q. That is the most you have seen any place?
A. About that.
Q. Well now, could you tell when you went up there and looked this coupler over, Mr. Solomon, whether this two and one half inches of side play was there when the coupler was originally put on?
A. No, sir; I don't think it was.
43 Q. Well, could you tell from your examination of it?
A. Why, yes, sir.
Q. Well, were you able to tell what the side play was when it was first put on?
A. Well, it would be about an inch.
Q. How do you fix that? What was there about it which indicated that to you?

A. Well, a man's eyesight ought to judge about an inch.

Q. Well, I know but what was there about the coupler that indicated to you that that was what the side play was when it was first put on?

A. Why, a fellow can shove them over and look at them.

Q. Well I know but you say when you went there first two and one half inches. Now, how can you tell when it was first put on it was about a half inch?

Mr. ANDERSON: He didn't say that.

A. I saw this draw-bar measured.

Q. I know it but what I am asking you is this: Were you able to tell whether the coupler was made with that much side play or whether it worked to that size?

A. It worked to that size.

Q. Well now, what was there about the coupler which indicated to you that it had worn to that size,—where did you see there had been any wear?

A. Why, there isn't anything to hold it. There isn't anything to hold it in between the hangers.

Q. But what had worn?

A. There wasn't any lining in the drawbar at all. All she
44 was on was the hanger.

Q. What was the distance between the drawbar and the hanger?

A. You mean at the collar?

Q. The extreme distance at the collar?

A. Two and one half inches.

Q. How do you know it was ever any less than that?

A. By looking at other drawheads.

Q. I know but this drawhead I am asking you about, do you know that one was ever any less than that?

A. Yes, sir; I could see up above. You can see where it is battered, for one thing, against the side of the lining of the collar.

Q. How much would you say it was battered?

A. Oh, I don't know how much.

Q. That is the only thing that makes the difference between the inch and two and one half inches?

A. No, sir; the drawhead was never lined up that I could see.

Q. Do you know whether there was ever any lining in it?

A. There must have been.

Q. Well but did you ever see them?

A. I have seen them in others.

Q. In this coupler?

A. No, sir; not in that one.

Q. So that on this coupler itself, the only thing which indicated to you that the side play had ever been less was the fact that the side of the hanger was battered so, is that right?

A. What is that again?

Q. On this coupler the only thing that indicated to you that the side play was ever less than two and one half inches was the fact that it was battered some on the edge, is that right?

A. Oh, no.
Q. What else?
A. Well because the standard make of them and the standard play——
45 Q. I am asking you what you saw so far as this coupler was concerned?
A. I only saw that to my knowledge then, only that one day.
Q. Now, just what was it that was wrong with this coupler so that you couldn't lift that handle as you were coming down there toward this car at Schlitz's?
A. What do you mean? To open the knuckle?
Q. Yes.
A. The knuckle was too loose. The handle bent.
Q. And what else?
A. Oh, I don't know of any more.
Q. Knuckle was loose and handle bent, was that all?
A. I guess it is.
Q. I thought you said a little while ago there was something wrong with the pin?
A. No, I didn't.
Q. There wasn't anything wrong with the pin?
A. I said I couldn't see the pin.
Q. As far as you know there wasn't anything wrong with the pin?
A. No, I don't think.
Q. And I thought you said a while ago there was something wrong with the chain?
A. Well, the chain was too long.
Q. The handle of the cutting lever didn't come back against the end of the tank, did it?
A. The handle of the cutting lever?
Q. Yes, where you take hold of the handle. It was never permitted to come clear back against the end of the tank?
A. No, I don't think so.
Q. The chain wasn't so long that it would leave the handle come clear up there and strike against the end of the tank.
A. No, sir.
46 Q. Then what makes you think the chain was too long?
A. Well, by pulling on it. I couldn't just tell exactly but that chain would ringle every time you would jerk it up and down. The chain was flopping over the handle there.
Q. There had to be some slack in the chain?
A. There don't need to be.
Q. If they want it solid it would be customary to put a bar there?
A. No, sir.
Q. There is always some slack in the chain of the coupler?
A. Yes, but not a yard of it.
Q. Well, was there a yard of it?
A. Well, very near.
Q. At any rate that chain wasn't so long that the end of the lever would come up and hit against the side of the car?
A. No, sir.

Q. You say you had that chain stretched up tight as you were going down towards this car at Schlitz's?
A. Yes, sir; it was.
Q. Then those were the only three things that were wrong with it,—the handle was bent, this chain was too long and the knuckle was loose?
A. Yes, sir.
Q. That is the reason you couldn't open it?
A. Yes, sir.
Q. Now you think it had worn that way, do you?
A. I don't know whether that was a new knuckle put in there or whether there was to be something put in there or whether it wore that way.
Q. Do you think it is possible that that coupler was broken or bent into that condition when you were switching at the other place you switched just before you went to Schlitz's?
47 A. I don't know that. I couldn't say. You mean it was bent right at that time, switching Schlitz's?
Q. Yes, do you know whether it was or not?
A. No, sir. It was bent when we started.
Q. Well, you didn't have any trouble in switching your cars up there did you?
A. Yes, sir.
Q. Before you got to Schlitz's?
A. Oh, we were working on the head end of the engine then.
Q. But you didn't have any trouble switching your cars up there?
A. We used the front end of the engine up at them other two places.
Q. You didn't have any trouble up there?
A. No, sir.
Q. Did you have any trouble with this coupler before at any time?
A. Which one?
Q. The one on the end of the tank?
A. Hadn't had any trouble with it up to the time I got hurt.
Q. At Schlitz's?
A. Yes, sir.
Q. I say you didn't have any trouble with this coupler until you were switching there at Schlitz's?
A. I didn't have any occasion to.
Q. You had worked on that engine before?
A. I can't say. I have worked on it, I suppose, but I don't remember the number of the engine.
Q. Well, you didn't have any trouble with that coupler before that you know of?
A. No, sir.
Q. Until there at Schlitz's?
A. Yes, sir.
Q. Now, Mr. Solomon, did your coupling make there at Schlitz's?
A. When I used my hand and opened it.
Q. Did you open it when the engine was moving?

A. Yes, sir.
48 Q. Where did you stand?
A. On the footboard.
Q. Which hand did you take hold of it with?
A. Left.
Q. And how did you do, did you pull the coupler over?
A. Opened the knuckle.
Q. With your left hand?
A. Yes, sir.
Q. And the coupling made then?
A. Yes, sir.
Q. Did you do any more switching at Schlitz's after moving that car?
A. Yes, sir; we turned those three cars around.
Q. And used this coupling?
A. Yes, sir.
Q. Did you have any more trouble with it there?
A. Out on the hill she missed.
Q. Well, besides that time did you have any trouble with it at Schlitz's?
A. No, sir.
Q. How many couplings did you make when she went all right?
A. Oh, I don't know. She didn't make any couplings without the assistance of my hands.
Q. How many couplings did you make besides these two you have told us about?
A. Oh, about three.
Q. And you say when you were up on that hill it missed and what did you do then?
A. Pulled away from it a little and let the car run down against it again after I shoved it over.
Q. And then the coupling made all right?
A. Yes, sir.
Q. Now, were those the only times that you had any trouble with this coupler before you were hurt on this morning of the accident?
A. That is what I can remember.
Q. That is all you remember of, and how long was it after that until you had your accident?
A. Well, that was in the morning and in the afternoon
49 about 2:30 is when it happened.
Q. What switching had you done in the meantime?
A. Not any with the tank.
Q. I know, but what switching had you done, I say, between this 9:30 or 10 o'clock in the morning and 2:30 when you were hurt?
A. Well, we went down and over here on the branch and took some box cars and put them on the hill above Dalzell's.
Q. Then what did you do?
A. Backed up and went to dinner.
Q. That was all you did until after dinner?
A. Yes, sir.
Q. Then after dinner what switching did you do?
A. Oh, we went down in the warehouse and pulled the warehouse

and throwed them on the scales and went down and went over there to get that empty car.

Q. Now, Mr. Solomon, you say as you were going in on that siding how was the knuckle of the engine, open or closed?

A. Closed.

Q. How was it on the car?

A. Open.

Q. Now, just go ahead and tell us what you did?

A. What do you mean, when I went to make the coupling?

Q. Yes, just tell us what you did?

A. Well, when he told us to go over there and get that car I went up to the switch and throwed the switch over and walked back about six yards and gave him a signal to come up and stepped on the footboard and was going back there when I turned around and seen the knuckle closed.

50 Q. Where was your engine then?

A. On the six inch track.

Q. About how far from where the car was?

A. About a car and a half or two car lengths when he started back.

Q. Go ahead?

A. Got back pretty close and I jerked at the knuckle four or five times and she wouldn't open.

Q. Which side of the engine were you on?

A. Right hand side, on the engineer's side.

Q. Yes?

A. Pulled her up four or five times and she wouldn't open and I was getting pretty close then and when she came back I seen that she was out.

Q. How far were you from the other car when you noticed that?

A. About two and one half or three feet and I went to kick it over and just as it went part way over and my foot slipped off and went in between them.

Q. You were on the engineer's side?

A. Yes, sir.

Q. And the draw bar was swung over next to you?

A. Yes, sir.

Q. And you went to kick it over with your foot when your engine was about two and a half feet from this car?

A. Yes, sir.

Q. And your foot slipped?

A. Yes, sir.

Q. Which foot do you mean?

A. The left foot.

Q. That is the one that you kicked the drawbar with?

A. Yes, sir.

Q. Did it slip on the drawbar or glance off it?

A. Slipped off it.

Q. Just then the engine and car came together?

A. Yes, sir.

51 Q. And caught your foot, is that right?

A. Yes, sir.

Q. Why did you want to shove this knuckle over?
A. To couple it up.
Q. It was closed, wasn't it?
A. Yes, sir.
Q. You had opened it previously with your hand?
A. Yes, sir.
Q. Would the kicking of the knuckle over with your foot open it?
A. I wasn't kicking it to open it. I was lining it up.
Q. What is it?
A. I was getting it over in line with the other coupler.
Q. But did you think that would open it all right so as to make the coupling?
A. By kicking it?
Q. Yes?
A. No, sir.
Q. You previously opened it with your hand?
A. Yes, sir.
Q. Opened it as far as you could open it?
A. Yes, sir.
Q. Why didn't you do it this time?
A. Oh well, I can't tell you that.
Q. You were on the engineer's side, weren't you?
A. Yes, sir.
Q. You were head brakeman?
A. Yes, sir.
Q. You were placed there to give signals to him directing and controlling the movements of the engine so far as the making of any couplings were concerned?
A. Yes, sir.
Q. And he was bound to obey any signal that you gave him?
A. Yes, sir.
Q. If you signaled to him to stop when you discovered the drawbars were closed or were out of line he would have stopped his engine?
A. He couldn't have stopped.
52 A. Why?
A. He was too close.
Q. Why you were about two and one half car lengths away when it was discovered?
A. Oh my, no,—when we started back,—you must recollect that a fellow has something else to think about,——
Q. But I am just asking you this question,—when you discovered that the coupler of the car was open and the one on the engine was closed and you tugged at that lever and it wouldn't open, if you had signaled to the engineer he could have stopped his engine?
A. No, not where I was.
Q. He would have stopped it in response to your signal?
A. He would have tried to, I suppose.
Q. And then you could have adjusted the coupler so it would have opened, couldn't you?

A. Yes, sir.

Q. And you wouldn't have been in danger of getting your foot caught, if you had waited till the engine had stopped in response to your signal?

A. I never seen a man do that in my life.

Q. I know, but you could do it, couldn't you?

A. Oh, you could do it, yes, sir.

Q. Mr. Solomon, you have a book of rules, have you not?

A. No, sir.

Q. Did you never get a book of rules?

A. No, sir.

Q. Aren't books of rules given to all brakemen, switchmen?

A. They are supposed to be.

Q. You didn't get yours?

A. No, sir.

Q. Did you ever have your attention called to rule 266 with respect to going between cars for the purpose of opening knuckles?

A. Not to my knowledge.

53 Q. Certain rules are posted are they not on bulletin boards at points where employees are?

A. Yes, I have saw some bulletins, yes, sir.

Q. Did you ever see rule 266 posted on this bulletin board?

A. Read it.

Q. The rule which says that "Employees are required to use the utmost care and caution in coupling any cars where lumber or other freight projects over the ends of the same. They are forbidden under any circumstances to go between these or any other cars or to expose their arms or bodies between them unless they can do so with safety. It is required that cars be separated by at least ten feet before adjusting couplers or parts thereof when necessary for employees to expose their arms or bodies to danger when so doing."

A. I never remember of seeing it.

Q. Well do you remember of there having been a notice posted up March 9, 1911, to the effect, calling attention to this rule and requiring that men shall not go between the cars, that none shall go between cars for the purpose of opening knuckles unless cars are at least ten feet apart and are not in motion and not then unless he has notified the conductor or brakeman in charge, do you remember that rule?

A. No, sir.

Q. When you did know that there was a rule relating to them not going between cars to make couplings?

A. I never seen it.

Q. Mr. Solomon, about how fast was your engine moving as you came down there to make this coupling?

A. About as fast as you can walk.

54 Q. And how close was your engine to this car when you first noticed that the couplers were not in line?

A. About a half car length.

Q. What?

A. About a half car length. Maybe not that.
Q. About a half car length?
A. I can't tell you that.
Q. How close was it when you reached over with your foot to kick that coupler in place and in line with the one on the car?
A. About two and one-half or three feet.
Q. Now at any time from the time when you first discovered that it was necessary to make any adjustment of that coupler you could have notified the engineer by signalling him and he would have been required to stop?
A. He would if any of them would do it but I never seen any of them do it.
Q. But if you had done it he would have stopped and he was required to stop?
A. He might not.
Q. It was his duty to observe your signals?
A. It was his duty but does an engineer always see a signal?
Q. And you knew that at that time?
A. I wasn't thinking about that then.
Q. Well you knew it to be a fact at that time?
A. Yes, sir, if you gave an engineer a signal to stop he would stop if he would see you.
Q. And yet when your engine was down there within two and one-half feet of that box car you deliberately took your foot and tried to shove that coupler over so it would be in line with that one on the car?
A. Yes, sir.
Q. And your foot slipped off and was caught between the knuckles and crushed?
A. Yes, sir.
55 Q. And you are not able to tell us now just what particular thing it was about that coupler which prevented it from coming open when you pulled the lever?

Plaintiff objected.

Q. Are you able to tell?

Plaintiff objected; overruled; plaintiff excepted.

A. Well it is just like I said about the knuckle being too loose in there and the chain and the lever.
Q. Pretty much everything about the coupling was wrong?
A. She was out of whack all around.
Q. Pretty bad coupler?
A. Yes, sir.
Q. Did it ever work satisfactory do you think?
A. Not with me.
Q. Had you had any experience with it before that?
A. No, not to my knowledge.
Q. But so far as your knowledge goes it was a pretty bad coupler and wouldn't work at all properly?
A. Yes, sir.

Q. Mr. Solomon, just another question. Did you want this coupler on the engine open or closed?
A. Wanted it open.
Q. And you couldn't get it open by pulling on the lever?
A. No, sir.
Q. Would the coupling make at all when the coupler was closed?
A. Would it make?
Q. Yes.
A. Not in the condition it was in.
Q. Well would the coupling make at all, I say, with the coupling closed, would the coupler have to be open?
A. Not as long as the other one was open. If the other one was open it would make.
56 Q. Well the other one was open?
A. Yes, sir.
Q. Well then the coupling would have made even though the coupling on the engine was closed?
A. Oh, no, not then it wouldn't.
Q. Why not?
A. Because it wasn't in line with the other coupling.
Q. But assuming it had been in line would it have made?
A. If the one on the car would have worked it would, yes, sir.
COURT: In other words, I understand it was only necessary for one of the two to be open if they are in line?
A. It is always policy to have the- both open.
Q. Well the question is would it have made with just one of them open?
A. If it was in line with the other one, yes, sir.

Redirect examination:

By Mr. ANDERSON:

Q. Mr. Solomon, you said in cross examination that you went back to examine this coupler some three months ago?
A. Yes, sir.
Q. And with whom did you go?
A. With Mr. Reel.
Q. That is Harry Reel?
A. Well that is what I know him by as "Mr. Reel."
Q. And you may tell the jury whether or not some measurements were made by Mr. Reel in your presence?
A. Yes, sir.
Q. And when you speak of the drawbar swinging you said that there was two and one-half inches from the draw-bar to
57 the collar, there was a space of two and one-half inches?
A. At the collar of the drawbar, yes, sir.
Q. You may tell the jury whether or not the drawbar was pushed clear over to one side when that measurement was taken?
A. Yes, sir.
Q. Now there was two and one-half inches from the drawbar to the collar,—now did you see the front end of the knuckle or the

front end of the drawbar measured to see how much of a side play it had at that extreme, not at the collar but at the extreme front end?

A. Yes, sir.

Q. How much was it at that extreme front end?

A. Either four and one-quarter or four and one-half, I ain't sure which.

Q. Mr. Solomon, assuming that the coupler on the car about to be coupled onto is lined properly and that the drawbar is pushed clear over to the extreme right or extreme left, to the extent of four and one-quarter to four and one-half inches, tell the jury whether or not a drawbar so pushed over will couple with a car that is properly lined?

A. No, sir, it will not.

Q. You also said that there was no lining between this drawbar and the hangers or the collar, tell the jury what you mean by lining?

A. Well in some drawbars they have in under the tank, or any place, they have springs. I have seen them with some springs, and then they might have solid lining.

Q. What is the object of that solid lining or springs?

A. The solid lining is to keep it in place or the springs keep it in place.

Q. Was there any on this drawbar?

A. No, sir.

58 Recross-examination.

By Mr. MANCHESTER:

Q. Mr. Solomon, do you know what kind of a coupler this was?

A. I believe it was a Climax.

"That's all."

Plaintiff then called as a witness to testify in his behalf C. A. PRICE, who being first duly sworn, testified as follows:

Direct examination.

By Mr. ANDERSON:

Q. What is your first name, Mr. Price?

A. Charles.

Q. You live here in the city?

A. Yes, sir.

Q. What is your present business?

A. Why I am keeping books at the present time.

Q. And tell the jury whether or not you have ever railroaded?

A. Yes, I railroaded over twenty years.

Q. In what position?

A. Conductor and brakeman.

Q. Mr. Price, I will ask you whether or not at my request you made certain measurements, examinations of the coupler, and drawbar, on the rear end of the tender of Erie switch engine number 75?

A. I did.

Q. Where was the engine located when you examined it?
A. It was laying at the bottom of the hill in what they call Cartwright's mill.
Q. With reference to the drawbar and with reference to any side play in the drawbar tell the jury what you did and what you found?
59 A. I throwed the drawbar over and marked it and throwed it back, measuring each time, and where the drawbar was in the yoke of the tender there was a play there of two and one-half inches, which out at the forward end would throw it a great deal more. I didn't measure out at the front end.
Q. What if anything did you do in reference to trying to open the knuckle?
A. I tried to open the knuckle with the cutting device.

Defendant objected.

Q. About what date was this, Mr. Price?
A. I couldn't say offhand. It is home in a book I had up there that I took down the date also but I just forget the date.
Q. Are you able to tell us about what month it was?
A. I think it was in June.
Q. Your best recollection is that it was in June?
A. Yes, sir.
Q. Well now I will ask you, Mr. Price,——

Mr. MANCHESTER: I will withdraw the objection.

Q. Now, Mr. Price, with reference to the opening of the knuckle; what observations did you make or what test did you make and what did you find, tell the jury in your own language?
A. Why I tried to cut, or pull the lock out from the drawhead to allow the knuckle to swing open and I tried three, four, or possibly five times before the chain would come up through this opening. Now a cutting device,—that is the lever, understand, by continual wear and work and pulling, will naturally bend this bar that the chain is connected on, continual pulling will wear that
60 down,—it will lose that spring or bend down and there was quite a large amount of this chain down in the drawhead. You go to pull up the chain the links sometimes will get crosswise or end ways, and it will prevent the chain coming up as far as it would otherwise if it was just its proper length.
Q. What was the result on the opening of the knuckle, did it open clear open or not?
A. Well, no, there is some knuckles that don't open. There is some ones with springs to- that spring open the minute you release the tick on the inside. Now this wasn't one of that kind.
Q. In working four or five times did it come open?
A. Yes. I got it. I tried three or four different times.
Q. Each time tell the jury whether or not you would have to jerk it?
A. I had to spring it. It didn't come the first time, any time I tried it.

Q. At any time you tried even with three or four jerks did it come clear open?
A. No, sir, it was on about what I would say one-third way.

Cross-examination.

By Mr. MANCHESTER:

Q. Mr. Price, you said the total side play at the yoke where the drawbar passes through the yoke was two and one-half inches?
A. Yes, sir.
Q. You didn't measure it out at the end?
A. No, sir.
Q. And when you came to pull up on the cutting lever you had to give it a pretty smart jerk before it would come open?
A. I jerked it three or four or five times before it would come open.
61 Q. Didn't you find this, that if you gave it an easy jerk it would only come a little ways but if you gave it a sharper, harder jerk, it would come open?
A. No, sir.
Q. Did you try that?
A. Yes, sir, I tried it. When it came it came altogether.
Q. Yes, that is what I mean. It came altogether on one jerk?
A. No, sir. As I explained to you here,——
Q. Well I know. I don't care about that now. We understand that. I am just asking you what the fact is, you say it finally did come clear open?
A. No, sir.
Q. Well you say it came altogether, what do you mean by that?
A. Why the cutting lever, understand, I told you I tried three or four or possibly five times before it freed.
Q. Before it what?
A. Before it unlocked. Freed the knuckle and let it come open.
Q. Then did it come open?
A. About one-third way.
Q. And you did that with the cutting lever?
A. Yes, sir.
Q. By pulling up on the handle?
A. Yes, sir.
Q. Didn't take hold of it with your hands to bring it that far?
A. No, sir.
Q. Well you found this, didn't you? That the sharper jerk you gave it that the better it operated?
A. No, sir.
Q. How many times did you try to open it?
A. Three or four different times.
Q. Was that all?
A. Yes, sir.
Q. Were you ever employed on the Erie?
A. I was.
Q. You had an accident I believe?

A. I did.

62 Q. Lost your leg?

A. I did.

Q. Where are you working now?

A. How's that?

Q. Where are you working now?

A. I am keeping books in a wholesale fruit house on Front Street.

Q. Did you have a suit against the Erie?

A. No, sir.

Q. You say all couplers, there are some couplers that don't open entirely?

A. Yes, that is when I was there. They are making different kinds all the time and improving them.

"That's all."

Plaintiff then called as a witness to testify in his behalf C. HARRY MILLER, who being first duly sworn, testified as follows:

Direct examination.

By Mr. ANDERSON:

Q. What is your first name, Mr. Miller?

A. My first name is Couk.

Q. You live in this city?

A. Yes, sir.

Q. What is your present business?

A. Real estate dealer.

Q. You used to be a photographer here in this city?

A. Yes, sir.

Q. Where was your studio?

A. 26 West Federal.

Q. I will ask you whether or not you made some photographs in the Solomon case for us?

A. I did.

Q. The rear end of a locomotive tender?

A. Yes, sir.

63 Q. Mr. Miller, I will hand you a photograph marked "Plaintiff's Exhibit A" and tell the jury what that represents?

A. That represents a view of the coupler on an engine tender in the Erie yards, Erie Railroad, I should say.

Q. Do you recall the number of the engine?

A. No, I don't recall the number.

Q. I accompanied you up there, did I, at the time those were taken?

A. Yes, sir.

Q. Mr. Miller, did you make any measurements of the drawbar or the play between the drawbar and the hanger or the collar as it is called, do you recall that?

A. There was some measurements taken, made some but I can't say definitely just what.

Q. You don't recall what the measurements were at this time?
A. No, sir.
Q. Now take "Plaintiff's Exhibit B" and I will ask you whether or not that is the same locomotive, same coupler that is shown in "Plaintiff's Exhibit A"?
A. It is.
Q. And tell the jury whether or not that was taken at the same time?
A. It was.

Mr. ANDERSON: I wish to introduce these photographs.
COURT: They may be received.

Cross-examination.

By Mr. MANCHESTER:

Q. When was this taken, Mr. Miller?
A. I do not remember just the exact date of that.
64 COURT: About how long ago?
A. Oh, in the fall, no let me see, oh, in the summer or fall.

"That's all."

Plaintiff then called as a witness to testify in his behalf EDGAR McCLAIN, who being first duly sworn, testified as follows:

Direct examination.

By Mr. ANDERSON:

Q. Your name is Edgar McClain?
A. Yes, sir.
Q. You live in this city?
A. Yes, sir.
Q. Tell the jury what if any railroad experience you have had in the past?
A. It will take me a good while to tell all of it. Before I was twenty-one I worked on the railroad as brakeman, broke on local freight, passenger train, yard conductor, till I was about twenty-two,—quit and went to school for over two years. That work was for the old Atlantic and Great Western. I worked for the Pan Handle as freight and coal train conductor for something over two years and I worked for the Lake Erie a while and B. & O. and back to the Lake Erie. I expect I have worked on the railroad in every capacity from yard brakeman and freight brakeman, yard conductor, local freight conductor, passenger conductor, assistant train master, general yard master, for about twenty-four years, to make it conservative.
65 Q. A long service?
A. Yes, sir
Q. Mr. McClain, did you at my request make some measurements of the drawbar and examine the coupler at the rear end of locomotive switch engine number 75 at the Erie?
A. I did.

Q. And if so when?

A. In June. I couldn't tell without looking at the memorandum I made at that time. The early part of June, one evening after quitting time,—after four o'clock.

Q. Were was the locomotive located?

A. It was near the round house in the Brier Hill yards.

Q. You made some measurements, Mr. McClain, between the collar and the drawbar?

A. Yes, sir.

Q. Could you give us those measurements?

A. I could if I am allowed to look at my memorandum. I couldn't carry it in my mind.

Q. No,——

A. I would be permitted?

COURT: Have you got it with you?

A. Yes, sir.

COURT: Memorandum made by you at the time you took the measurements?

A. Yes, sir, made right at that measurement.

Q. I will ask you before giving those facts, Mr. McClain, whether or not you shoved the drawbar clear over to one side or whether you just left it and measured both ways?

A. I shoved it to one side and measured the distance from the hanger bolt to the drawbar when the drawbar was on the other side, and shoved it to the other side and measured. That would give me the lost motion.

66 Q. Now let me ask you again, Mr. McClain, what observations did you make,—what observations did you make of the knuckle, if any, and what tests did you make to determine whether or not the knuckle would open?

A. I opened and shut the knuckle by hand and measured it and I shut it by hand and used the cutter bar to open it. I found the knuckle wouldn't swing open although it was unlocked. You understand by unlocking, it wasn't fastened perfectly shut but it wouldn't swing open.

Q. Were you able to swing it open by means of the cutting lever?

A. No, sir.

Q. What if any tests or how did you try,—did you try to open it?

A. I tried the cutter bar several times, and I shut it by hand so it would lock,—I would take the cutter bar and after shutting it I gave a read hard jerk open,—sometimes when any automatic coupler don't work with an easy quiet opening, it will with a quicker jerk,—it wouldn't swing clear open so as to put it in coupling position then; it would move a little, probably by the jar but it wouldn't open.

Cross-examination.

By Mr. MANCHESTER:

Q. Mr. McClain, what are you doing now?

A. Keeping books and accounts.

Q. Where?

A. Well I am working now, if I wasn't here at the court, at the squire's office, copying books for the township trustees.

Q. At whose request did you examine this coupling?

A. Mr. Emil Anderson.

67 Q. Was Mr. Solomon there at that time?

A. I don't think I ever saw that gentleman until I seen him here in the court house today.

Q. Who was there with you?

A. Nobody.

Q. Now you say you made a measurement between the drawbar and the edge of the hanger in which it was?

A. Yes, sir, now you say hanger,——

Q. What do you call that?

A. There is two bolts goes down to hold the coupler up and from where these bolts goes down which would be the side of what you probably call a hanger, as the old fashioned drawbar had a chair hanger, there it would be different, measured from there over.

Q. I will show you this photograph marked "Plaintiff's Exhibit A" do you mean by the hanger that iron or metal strip underneath the drawbar?

A. From this edge up against that drawbar, not figuring this, up against the drawbar.

Q. Straight across from the edge of the hanger to the drawbar?

A. Yes, sir, just as you see it there. That looks as if it was pushed,——

Q. That is just the way it was when you took the measurement?

A. Practically, so far as I can see, of course.

Q. Shoved over to that side as far as it would go?

A. Yes, sir.

Q. What was that distance?

A. I would have to look at that to tell you.

Q. Yes, go ahead.

A. Well the space on the left hand side when the drawbar
68 was shoved over the other way was one and one-eighth inch and when shoved over,—that is measuring at the top of the drawbar, and shoved over to the right it was one and five-eighths inch and then at the bottom it measured a little more,—the space was a little bit wider, probably, and the hanger tipped a little bit, and at the bottom it measured one and one-eighth when shoved to the left and when shoved to the right it measured two.

Q. What is that at the bottom?

A. When measuring right at the extreme bottom of the drawbar.

Q. The first two measurements you gave were right at the top?

A. Yes, sir, it shows very little difference.

Q. Now which determined the extent of side play, the top or bottom?

A. Well the side play wouldn't take in all of the bottom there was an occasion where you wanted to rock the drawbar.

Q. But unless it was crooked it would be governed by the top measurement?

A. Yes, sir, largely.

Q. Now let me show you this photograph marked "Plaintiff's Exhibit A" and ask you if there was any difference in the measurements of side play between the slot cut in the end sill of the tender and between the hanger itself of the drawbar, any difference in those measurements?

A. Well my recollection,—of course there might be a,—well you, —now I measured from the top of this drawbar and I didn't make any memorandum whether it was this or that but it measured this measurement I gave you from the top of the drawbar and over. It wouldn't make as much difference as that though.

Q. Did you stand up on the footboard of the engine or were you standing at the side of the engine?

69 A. When I pushed it over I stood on the footboard to push it over, not at the side of the engine, I was at the end of the tank.

Q. When you worked the cutting lever did you stand on the footboard?

A. At the side of the tank, just as I would if I wanted to couple.

Q. Which hand did you use?

A. Well I think the one or the both.

Q. How much did that knuckle weigh, have you any idea?

A. No, sir, because I am not familiar with that make of knuckle. It is one, the company that I worked for didn't use. Of course we might get it once in a while on a foreign car.

Q. What company did you work for?

A. Pittsburg and Lake Erie the last one. When I worked for the Lake Erie long years ago they didn't have such a thing.

Q. They used to use pin and link?

A. Yes, sir.

Q. And this kind of coupler you never used?

A. We might have got one on a foreign car but I wouldn't notice it unless something attracted my attention to it.

Q. Didn't you notice that the sharper jerk you would give on the cutting lever the wider the knuckle would come open?

A. I knew that to be a fact. That is the reason I tried that but it didn't have the desired effect altogether on this knuckle. Now I would like to say one thing here. I don't know whether you want it said or not.

Q. I am just asking you whether it opened?

A. It didn't open.

Q. Well didn't it open somewhat?

A. Just a little bit, nor far enough to make a coupling.

70 Q. Mr. McClain, one other question. In this photograph marked "Plaintiff's Exhibit A" is that coupler open or closed?

A. That coupler is open. Here is your knuckle standing straight out. Here is what locks when it goes in and it is out now.

Q. So it is open now?

A. Yes, sir.

Q. How long is that from the place where the drawbar goes into the beam we will call it, out to the front end of the knuckle,—what is the total distance, Mr. McClain?

A. Well there is a little room to go there between the shoulder of the drawbar as it shows in that photograph and the end beam of the tank. That was four and one-half inches. When I say the shoulder I mean the part of the drawbar when it is pushed in comes up against the beam,—about four and one-half inches from the tank sill to the shoulder of the drawbar when the drawbar was pulled out. And there was ten and one-half inches from the shoulder to the end of the rigid jaw where the knuckle fits in and there was about three and one-quarter inches from the jaw to the end of the knuckle. That would make altogether from the car when the drawbar was out at full length about eighteen and three-quarter inches.

Q. Are you able to tell us how much the play would be then at the extreme front end, Mr. McClain?

A. I didn't measure it but it is easily come at,—if *is* was moved,——

Mr. MANCHESTER: That would be a matter of mathematics?

A. Yes, sir, you can do it as well as I can. If it was moved
71 one and five-eighths at the car, eighteen inches out from there it would move that much more.

Q. Well that was you say one and five-eighths inches, would that be at the right or the left?

A. I think at the right but I will look to make sure. That was at the right, yes, sir.

Q. How much at the left?

A. That was one and one-eighth.

Q. 1⅛ at the left and 1⅝ at the right?

A. Yes, sir.

Q. You mean with the drawbar centered?

A. No, I mean you are able to push it that far when you push it the extreme push one way and push it the other way all that it would push, not in the center, because the center of that drawbar in the hanger is very indefinite.

Q. Are you able to tell us from your observation if that drawbar were pushed to the extreme right or extreme left whether or not it would couple automatically with another car or whether it would miss?

A. It would depend a good bit on the position of the car, altogether.

Q. Well you didn't observe that?

A. No, I had no other car there.

Q. Did you observe why it was that the knuckle wouldn't open, Mr. McClain, with the cutting lever?

A. No, I didn't because some of the interior things that that might be caused by, that wouldn't be observable without going into the knuckle. That kind of information would be better given by a car repairer although I would know if I would go in there and see what was the matter. I didn't notice just why but I just found out that it wouldn't.

72 Q. You tried a number of times?

A. I tried at least a half dozen times.

"That's all."

Plaintiff then called as a witness to testify in his behalf H. M. REEL, who being first duly sworn testified as follows:

Direct examination.

By Mr. ANDERSON:

Q. Your name is Harry Reel?
A. It is.
Q. You are a resident of the city and have been so for a great number of years?
A. (No response.)
Q. What position do you now occupy,—what is your business?
A. Well I am civil engineer.
Q. And you were in the employ of the city as engineer?
A. For a great many years, yes, sir.
Q. Mr. Reel, I want to ask you whether or not you made some measurements and took some observations of engine number 75 and whether or not you have the notes of the measurements?
A. I have, yes, sir.
Q. What was the date?
A. Well now I don't find that I kept the date but my recollection is some two months ago.
Q. At my request?
A. At your request, yes, sir.
Q. Who accompanied you?
A. Mr. Cook. No, not Mr. Cook, the other gentleman's name,——
Q. Mr. Solomon?
A. Mr. Solomon, yes, sir.
73 Q. Where did you find the engine?
A. We found the engine West of Holmes Street in the Erie yard.
Q. And you say you made some observation of the coupler and drawbar at the rear end of the tender?
A. I did.
Q. Now, Mr. Reel, I want to ask you for two measurements of the drawbar; I want to ask what the swing was of the drawbar at the extreme front end,—the extreme swing?
A. The extreme swing was four and one quarter inches.
Q. What was the swing at the collar,—the extreme swing at the farthest point?
A. Two and one half inches.
Q. Now, Mr. Reel I want to ask you further whether or not you made any tests or took any observations as to whether or not the knuckle would open by means of the cutting lever,—tell us what you did and with what results?
A. We attempted several times to open the knuckle of the coupler and it worked indifferently, due as I regarded it to lost motion in the coupler.
Q. Were you able, by means of the cutting lever to open the knuckle?
A. No, sir, not solely.

Q. What did you use in making you- measurements, what kind of a line?
A. Used steel tape.

Cross-examination.

By Mr. CONROY:

Q. The collar, Mr. Reel, is of iron?
A. Yes, sir.
Q. And the total side measurement there was two and one half inches?
A. At the collar, yes, sir, the play in the collar was two and one half inches.
74 Q. Placing the drawbar in the center did it move any more to the right than it did to the left?
A. I couldn't answer that positively, no, there was some play in the collar. It was of itself loose.
Q. Wasn't the collar fit onto the tender?
A. Yes, sir, but not tight.
Q. Bolted on?
A. Yes, sir, but it was loose, some play there.
Q. But however your aggregate play was two and one-half inches?
A. Yes, sir, that would be the limit of the play in the collar in any case.
Q. And out at the end of the drawbar the greatest side play there was four and one-fourth inches?
A. Yes, sir.
Q. Moved in sort of a tangent out there?
A. It moves in the arc of a circle, yes sir.
Q. What is the distance from the collar itself out to the end of the drawbar?
A. The distance as measured was one foot, four and one half inches, that is from the extreme face of the coupler to the outer edge of the collar.
Q. In using the lever for the purpose of raising the pin or moving the knuckle, did you do that or did Mr. Cook?
A. I didn't do it, no.
Q. Who did do it?
A. Mr. Solomon.
Q. You didn't try it yourself?
A. No, sir. I was satisfied however with the trial, perfectly so.
Q. It seemed to move with some difficulty?
A. Well it worked indifferently. I would judge there was a great deal of lost motion in the device, in the coupler.
75 Q. Well there is lost motion there because it moved with difficulty?
A. Yes, sir.
Q. That is another way of saying "moving with difficulty",—"Lost motion"?
A. (No response.)
Q. How far did you open the knuckle,——

A. Well I should judge it would probably swing about half or in that neighborhood.

Q. You are not an expert on railroad knuckles are you?

A. Not on car couplers, no, sir.

Q. Haven't paid much attention to that and your judgment as to how much it did open you wouldn't pretend that it was accurate?

A. Well my judgment in that case is pretty well directed and I would say in answer to that that I would regard that the coupler worked indifferently, too much lost motion. It didn't work well if that is what you mean.

Q. Well that isn't what I mean. Do you know the position that the knuckle takes when it is fully open?

A. Yes, sir.

COURT: Possibly stated in another way would be this: do you feel as if you were sufficiently acquainted with the mechanism of that kind of a coupler so that your test would enable you to say that you didn't overlook some particular thing that would possibly have some bearing upon it?

A. I wouldn't fully claim to be expert on the matter but sufficiently so to be satisfied with the statements I made as to how I regarded the coupler.

Q. Well what was wrong with it that it wouldn't open to the full extent?

A. Well it might have been due to,——

76 Q. No, no, I don't want any theory of yours. I want if you observed any fact there, anything wrong that prevented it from opening to its full extent?

A. The cutting bar on top was bent.

Q. Would that prevent it?

A. It would make some lost motion.

Q. Why would it prevent it from opening?

A. There would be lost motion in taking up the chain.

Q. It would pull up the chain just the same?

A. Not as positively as it would if it wasn't bent.

Q. Well there is a little arm sticks out from the bar itself to which the chain is attached?

A. Yes, sir.

Q. And when you operate the handle to lift the chain out,—

A. Yes, sir, I am speaking of that bar. It was bent.

Q. So far as the bar was bent, that would come up al- right and the chain would come up al- right, wasn't there some difficulty between the chain and the interior part there?

A. It is possible.

Q. You didn't look in there to examine the pin itself?

A. No, sir, I did not.

Q. Are you familiar with the construction of the pin?

A. Only in a general——

Q. As to how and why it moves the knuckle?

A. Only in a general way. I will say that I had no immediate knowledge of this coupler itself. It was practically a new coupler to me but they practically all work on the same line.

Q. The knuckle moves on a bolt?
A. Yes, sir.
Q. And the portion of the pin or interior arrangement that strikes the knuckle and opens it out and pushes it, on the bolt, you
77 didn't observe?
A. No, sir, I made no interior measurement.
Q. The difficulty might have been a rusty bolt for all you know?
A. I wasn't impressed that way.
Q. You didn't examine the bolt to see if there was anything wrong with that?
A. No, sir.
Q. Or didn't examine the pin to see if there was anything wrong with that?
A. No, sir.
Q. All you did, Mr. Reel, was to observe that Mr. Solomon in working it that it didn't work satisfactory?
A. It didn't work satisfactory.
Q. Your main object there was to take these measurements that you had been directed to take?
A. Principally, yes, sir.

"That's all."

Mr. ANDERSON: We would like to have it appear on the record that the leg is off five and one half inches below the knee.

Plaintiff rests.

At the close of the evidence introduced by plaintiff defendant moves the court to direct the jury to return a verdict for the defendant; motion overruled; defendant excepted.

Whereupon the defendant, to maintain the issues on its part to be maintained and to rebut the evidence offered by plaintiff, called the following witnesses and introduced the following evidence, to-wit:

78 THOMAS JENKINS, being first duly sworn, testified as follows.

Direct examination.

By Mr. MANCHESTER:

Q. Mr. Jenkins, I believe you were conductor on the crew of which Mr. Solomon was a member at the time he was injured, were you not?
A. Yes, sir.
Q. And at the time of the accident you were switching at the Lower Works?
A. Yes, sir, Lower Works of the Carnegie Steel Co.
Q. What is it?
A. Lower Mill of the Carnegie Steel Co.
Q. What was the first thing that attracted your attention to the fact that anything was wrong, Mr. Jenkins?

A. When I heard the car, or the engine hit the cars I turned around.

Q. Just go on and tell the jury what you saw?

A. And I saw Mr. Solomon fall from between the tank and the engine. I ran up to him and picked him up.

Q. Did you see Mr. Solomon while he was between the engine and the car and before he was injured?

A. Why not just immediately before.

Q. Well I mean did you see the accident itself happen?

A. No, sir.

Q. You say you helped to pick him up?

A. Yes, sir.

Q. Did you have any conversation with him?

A. I asked him how he came to get hurt.

79 Q. What did he say?

A. He said "I slipped."

Q. Did he say anything further about the matter?

A. No, sir.

Q. I will ask you, Mr. Jenkins, whether or not after this accident happened you made any examination of the end of the tender, coupler and so on?

A. Yes, sir, after I came back from the hospital I looked at them.

Q. After you came back from the hospital, did you go to the hospital with Mr. Solomon?

A. Yes, sir.

Q. About how long was it after that when you returned?

A. It was probably one hour.

Q. Now go ahead and tell the jury in what condition you found the coupler on the tender?

A. So far as I could see it was al- right, the knuckle was open on the engine. The one on the car was closed I believe.

Q. Could you notice anything,—was anything wrong with the cutting lever or the chain or pin or any part of this coupler on the tender?

A. Not that I could see.

Plaintiff objected; sustained.

Q. Did you examine the coupler?

A. Not more than to look at it.

Q. And tell whether or not you found anything wrong with it?

A. I did not.

Q. Mr. Jenkins, how long had you been working with this engine, number 75?

A. I don't know just how long. We have had this engine for quite a while. It was our regular engine.

Q. What is it?

A. I don't know just how many days; it was our regular engine on that job.

80 Q. Had you used it before the time of this accident?

A. Yes, sir.

Q. Able to tell about how long?

A. Well we had it you might say very near continually for probably a month, maybe two months, of course there probably would be days in between that *that* we wouldn't have this engine but as a general rule that was our regular engine.

Q. And did you continue to work with the engine after the accident?

A. That day?

Q. Yes?

A. Yes, sir.

Q. And after that time did you?

A. Yes, sir. We had her days after that.

Q. Now on this day when the accident happened and after you came back from the hospital, tell the jury what work you did with the engine?

A. Why we went ahead with the work that we had started on when Mr. Solomon got hurt and worked until we finished up our work over there. I don't remember just what time we got done that evening.

Q. Did you couple onto this car where Mr. Solomon was hurt, this C. & I. car?

A. Yes, sir.

Q. Who did that work?

A. Mr. Timms made the coupling, the fellow that was called in Mr. Solomon's place.

Q. Mr. Timms continued to work in the crew in Mr. Solomon's place?

A. That day, yes, sir.

Q. Now tell the jury, Mr. Jenkins, whether you continued to use this same coupling on the tender the balance of the day and afterwards?

A. Yes, sir.

81 Q. Tell the jury whether or not you yourself at any time used that coupler in making couplings?

A. That day?

Q. Yes, sir, that day or any time after?

A. I had before that and have since that but I couldn't say that I myself made a coupling with it that afternoon.

Q. Well at any other time did you, either before or after the accident?

A. Yes, sir, I have made couplings with it.

Q. Now tell the jury in what condition you found the coupler?

A. Why I didn't find it different from any other coupler.

Q. Could you couple onto cars with it automatically?

A. Yes, sir.

Q. By shoving the cars together?

A. Yes, sir.

Plaintiff objected.

Q. Just go ahead and tell the jury how you made couplings with this coupler, Mr. Jenkins?

A. Same as you would with any other coupling.
Q. Well now how is that, just explain. Tell what you do?
A. Why you open your knuckle and,——
Q. How do you open the knuckle?
A. By pulling the lever.
Q. That is you do that with this coupler?
A. I have, yes, sir.
Q. Then what would you do after having done that?
A. Signal the man to,—whichever way,—if you were backing up, with that coupler we would have to give him the back up sign to back again- the cars.
Q. Then would the couplers couple?
A. Ordinarily, yes, sir.

82 Q. Now, Mr. Jenkins, in using the coupler on the tender of this engine tell the jury whether or not you were able to open it by means of the cutting lever?
A. Yes, sir, as far as I can remember.
Q. Have you, yourself, done it?
A. Yes, sir, but I never remember of having any trouble with it.
Q. And did you continue to use that coupler right along on that engine afterwards?
A. So far as I know, yes, sir.
Q. Mr. Jenkins, were you present when this coupling was made following the accident when Mr. Timms acted as brakeman?
A. Yes, sir.
Q. Did you see that coupling made?
A. Yes, sir.
Q. Just tell the jury how it was made?
A. Why the same as you would make any other coupling. We looked at the knuckle, it was already open and he gave him a sign to back up and he back- onto the cars and the coupling was made.
Q. Was it necessary to adjust the coupler any way?
A. I don't think they did.
Q. Now, Mr. Jenkins, was the lever to this coupler bent in such a way that it couldn't be operated?

Plaintiff objected; sustained.

Q. I will ask you if this cutting lever on this coupler was bent?
A. No, sir, I don't think it was.
Q. Was the chain on it too long?
A. No, sir, I don't think so.
Q. In short, Mr. Jenkins, was there any difficulty in making this coupling at all?

A. Not to my knowledge. I found no more trouble with
83 that coupler than any of the rest of them.

Cross-examination.

By Mr. ANDERSON:

Mr. Jenkins you were conductor of the crew in which Solo-mon worked?

A. Yes, sir.

Q. You may tell us whether or not you are still in the employ of the Erie?

A. Yes, sir.

Q. As conductor?

A. Yes, sir.

Q. And who were the members of your crew under you on that day?

A. Why Mr. Mulvihill was the engineer. Mr. Reddinger, fireman. Mr. McFadden, brake-man. Mr. Solomon was the other brakeman.

Q. You were doing some switching in the lower mill yard?

A. Yes, sir.

Q. Now the car that you were about to move, do you remember the name or number of that car?

A. No, I do not.

Q. Was it a C. I. & S. car?

A. I wouldn't say positively but I believe it was a C. I. & S. car.

Q. What kind of a movement were you going to make there. Where were you to take that car and where were you to place it?

A. We were to catch two cars off of this track and couple onto another track and shove back in on this track again, I believe.

Q. Were the cars loaded or empty?

A. Loaded.

Q. With what?

84 A. I wouldn't say positively but I believe they were loaded with billets.

Q. Steel billets?

A. Yes, sir.

Q. But so far as this move was concerned, you were just going to make that switching move there in the yard?

A. Yes, sir.

Q. You were not going to make up a train?

A. No, sir.

Q. You simply switched in the yard?

A. Yes, sir.

Q. That is from one part of the mill yard to the other?

A. Yes, sir.

Q. Ordinarily you didn't make couplings did you, Mr. Jenkins?

A. Why sometimes I do, yes, sir.

Q. Well I say ordinarily you leave that to your switchmen, brakemen, don't you?

A. As a general rule.

Q. You order them what to do, direct them what to do don't you?

A. (No response.)

Q. You tell them what movement of a car or cars you wish done and they go and perform that movement?

A. Yes, sir.

Q. So that you had not paid particular attention or made any special examination of the coupler on this tender before the accident, had you?

A. No special exaxmination, no sir.

Q. You made no special examination of this coupler on this tender after the accident, either, did you?

A. I looked at it, yes, sir.

Q. But you didn't make any special examination or close examination, did you?

A. No, sir.

85 Q. And you can't tell us whether or not that cutting lever was bent in any way, can you?

A. No more than if it was bent I didn't see it.

Q. Neither can you tell us whether or not the chain was too long or too short, can you?

A. If it had been too long or too short I would have seen it.

Q. You might have seen it?

A. I would have seen it.

Q. Oh, you would have seen it?

A. Yes, sir.

Q. Can you tell us whether or not the knuckle was loose or worn from your examination?

A. No, sir.

Q. And can you tell us how much side play at the extreme front end that drawbar had?

A. No, sir.

Q. Assuming, Mr. Jenkins, that that drawbar had a side play at the front end, so that the front end of the coupler would swing to the extent of four and one quarter to four and one half inches and assuming, Mr. Jenkins, that the drawbar was pushed clear over to the extreme right or extreme left, and you were going to couple to a car on a straight track and the drawbar of the car was properly lined up, but the drawbar of the tender four and one half or four and one quarter inches to the extreme right, would that couple automatically upon impact?

A. If it was to the extreme?

Q. Right or left?

A. No, sir, I don't suppose that it would.

Redirect examination.

By Mr. MANCHESTER:

Q. Mr. Jenkins, you were conductor of the crew with which Mr. Solomon was a member?

A. Yes, sir.

86 Q. Did Mr. Solomon or any other switchmen or brakemen under you ever make any complaint to you concerning the condition of this coupler?

A. No, sir.

"That's all."

Defendant then called as a witness to testify in its behalf JOHN MULVEY, who being first duly sworn testified as follows:

Direct examination.

By Mr. MANCHESTER:

Q. Mr. Mulvey, you live in this city, I believe?
A. Yes, sir.
Q. And are employed by the Erie Railroad now as an engineer?
A. Yes, sir.
Q. Were you the engineer on this crew?
A. I was.
Q. When Mr. Solomon was injured?
A. Yes, sir.
Q. Did you see the accident occur?
A. No, sir, I didn't see the accident occur.
Q. When was the first you learned of it?
A. When Mr. Solomon fell from the rear end of the engine.
Q. Just go ahead and tell the jury what you saw and what you did?
A. We were backing in on the,—what we call the six inch track, and Mr. Solomon was on the rear end of the tank of the engine, was going to couple onto two cars that stood in there, and he stepped on the back end and gave me a signal to back up and I
87 answered his signal and backed up and about the time we struck the cars,—when we struck the cars the first I seen was Mr. Solomon drop off from the end of the tank.
Q. Then what did you do?
A. I reversed the engine, slacked ahead a short ways and got down and assisted the conductor to take care of Mr. Solomon.
Q. I will ask you Mr. Mulvey, whether you continued to work with the crew after Mr. Jenkins returned?
A. How's that?
Q. I will ask you whether you continued to work with the crew after Mr. Jenkins returned?
A. Yes, sir.
Q. I will ask you whether or not you afterwards coupled onto that same car?
A. Well now I wouldn't answer that, but to the best of my knowledge I believe we did.
Q. Did you make any examination of the coupler after the accident occurred?
A. I did.
Q. Tell the jury in what condition you found it?
A. I examined the cutting lever. That is, raised the cutting lever and the knuckle flew open. I also saw the inspector operate lever.
Q. Who was that inspector?
A. John Wolfe.
Q. What did he do?
A. Well he worked the lever and I should judge fully five or six times without any apparent difficulty at all.

Q. State whether or not the knuckle opened?
A. The knuckle opened, yes, sir.
Q. What was the condition of the cutting lever, chain, pin,——
A. Well I could find no defect. Could find nothing wrong.
88 Q. When was it that you made this examination of the coupler?
A. After Wolfe had made the examination.
Q. How long was that after the accident?
A. Oh it was quite a while afterwards, I don't know just exactly how long.
Q. What was the answer.
A. I said it was sometime afterwards, I don't know just exactly how long.
Q. Did you make any examination of it immediately after the accident occurred?
A. Well after Mr. Wolfe had examined it, Mr. Wolfe tried the accident happened?
Q. The same day?
A. Very same day, yes sir.
Q. Mr. Mulvey, had you been operating this engine before this accident occurred?
A. Yes, sir.
Q. And did you operate it afterwards?
A. I did.
Q. State whether or not there was any difficulty in the way of using the coupler so far as you know?
A. Well I experienced nothing out of the ordinary; had no trouble with it.
Q. Did you at any other time yourself take hold of the cutting lever and open the knuckle?
A. I tried it that morning before starting out. That is before we started to work that morning.
Q. In what condition was it then?
A. It was al- right.
Q. And how did you come to examine it at that time?
A. Well I will tell you why I examined it that morning. The hostlers had been operating the engine down from Brier Hill and they had her coupled onto a passenger engine and those pas-
89 senger engines had pilots on and the angle cock on the tender had been moved so as to prevent the hose from becoming damaged by the pilot of the other engine, consequently the hostler or someone turned the angle cock out and I put it back to its position again.
Q. Mr. Mulvey, how frequently have you operated that engine before and after this accident occurred?
A. Oh I forget, I have worked it different time- afterwards but just how many times I couldn't say.
Q. What is the fact as to whether you and your crew continued to use that engine in doing your switching?
A. Yes, sir, we continued to do the work with the engine. We

finished the day with the engine, worked the following day with it.

Q. I mean for how long a time after that?

A. How's that?

Q. I am asking you whether you after the accident happened on other days you continued to use this engine and coupler?

A. Oh we used her for some time afterwards. Quite a while afterwards.

Q. Did you have any trouble with the coupler at all?

A. Nothing out of the ordinary.

Q. Mr. Mulvey, is it,—do couplings always make?

A. Do they always make?

Q. Yes?

A. No, sir.

Q. How do you explain that?

A. Well I couldn't just exactly give a clear explanation on that. I know that sometimes when we back up to cars that the couplers don't work. You find that very often the case. Sometimes
90 a coupler is not open or possibly on a curve or something of that kind.

Q. And in that connection, Mr. Mulvey, this siding which has been spoken of at Schlitz's, is that straight track or curved track?

A. At Schlitz's?

Q. Yes?

A. That is on a curve.

Q. What is the fact as to whether there is more or less difficulty in making a coupling on a curved track than on a straight track?

A. Well there is more difficulty in making one on a curved track.

Q. Why is that?

A. Well I suppose on account of the nature of the curve, that would have something to do with it.

Cross-examination:

By Mr. ANDERSON:

Q. Mr. Mulvey, you are the engineer?

A. Yes, sir.

Q. And you recall this accident?

A. Yes, sir.

Q. And immediately after the accident you stepped down from the engine, didn't you?

A. Yes, sir.

Q. You saw Solomon there did you?

A. I did.

Q. How was his foot, his leg?

A. It was mashed.

Q. At that time I want to ask you how the knuckle was, open or closed?

COURT: You mean on the tender?

Q. On the tender, yes, sir?

A. How was the knuckle, open or closed?

Q. Yes?

A. After the accident?

91 Q. Immediately after the accident when you stepped down from your engine?

A. The knuckle was open.

Q. Open?

A. On the tender, yes, sir.

Q. Your deposition was taken was it not?

A. I guess it was, yes, sir, before you.

Q. Yes, sir, before me, I want to ask you if in that deposition this question was not asked you "And what did you observe as to his foot, if anything?" Answer: "It was badly smashed." Question: "How was the knuckle at that time of the tender, if you recall, was it open or closed?" and do you remember saying "Closed"?

A. I don't remember nothing of the kind, saying that the coupler on the tank was closed. I said the coupler on the car was closed. That is what I said.

Q. "How was the knuckle at that time of the tender, if you recall, was it open or closed?" and do you remember saying "Closed"?

A. I don't remember saying anything about the knuckle on the tender being closed. I said the knuckle on the car was closed.

Q. Will you say you did not say that the knuckle on the tender was closed?

A. I don't think I did.

Q. You don't think you did?

A. No, sir, I don't think I did.

Q. Is that your signature?

A. It looks very much like it, hold on here.

Q. That isn't your signature?

A. No, sir, that isn't my signature.

Q. You were sworn up there?

A. Yes, sir, same as I am here too.

92 Q. And you say you did not say that that knuckle was closed?

A. I say I didn't say that the knuckle was closed on the tender.

Q. Now you said that you did make some close examination did you of the knuckle?

A. Yes, sir.

Q. You didn't just glance at it but you went up and examined it closely, didn't you?

A. Examined it closely.

Q. Yes, gave it a good examination?

A. Why I gave it, yes, a passing examination.

Q. Not a mere glance?

A. No, sir.

Q. Now I want to ask you if this question was asked you when those depositions were taken, "Did you go to the hospital?"

A. I went to the emergency hospital.

Q. Question "And when did you make the next observation, how soon afterwards?" Answer. "Well, when I came back from the hospital, that is the emergency hospital." That is correct? Question.

"Did you make any examination of the coupler of the car to which you were about to couple?" Now this is the car this time?

A. Yes, sir, al- right.

Q. And answer was "No, that is I didn't give it any particular attention, you know, just glanced over it. It looked al- right so far as I could see," that is correct isn't it?

A. That is correct, yes, sir.

Q. "Did you go up close to examine it?" "Yes, within a few feet." You so answered did you?

A. I did.

Mr. MANCHESTER: That relates to the car?

Mr. ANDERSON: Yes, that relates to the car but the other to the tender.

93 Q. How much side play, Mr. Mulvey, did that drawbar on the tender have?

A. Well, I measured that afterwards and I found about two and one-half inches, scant.

Q. At the collar?

A. Yes, sir, the side motion between the stem and the strap.

Q. How much would that make it at the extreme front of the coupler?

A. Well now I never measured that.

Q. Assuming, Mr. Mulvey, that it had a side play, an extreme side play at the front end of four and one quarter to four and one-half inches and assuming that it was thrown clear over to the right side or the left side, but that the coupler of the car was properly lined, I want to ask you whether or not it would couple automatically with such a car upon impact, if it was thrown to the extreme right or the extreme left.

A. That I couldn't answer.

Q. Why?

A. Simply because I don't know anything about it.

Q. You don't know anything about it?

A. No, sir.

Q. You don't know anything about the coupling of cars, much from the rear end?

A. No, sir, that ain't my business.

Q. Your business is to run the engine?

A. Yes, sir.

Q. And you pay but very little attention to the couplers do you?

A. Ordinarily no. I pay attention to them to see that they are in safe condition to operate but any further than that I have got nothing to do with it.

Q. But you haven't anything yourself to do personally with making couplings excepting from your engine?

A. No, sir.

94 Q. And you say, I believe, that this cutting lever was in perfect condition that morning?

A. It operated the knuckle all right.

Q. No defect in it was there?

A. Not to my knowledge.

Q. Did you give it a close examination?
A. The lever was bent a little but that wouldn't have,—I don't suppose, it didn't interfere with the coupling.
Q. Wouldn't the sagging of the lever, wouldn't that have some effect on the motion of that knuckle?
A. No, I don't know as it would. It might have some effect on the pin, on the lock pin, but I don't know as it would on the coupling.
Q. But if it had some effect on the lock pin it might keep it from opening?
A. Well that is just a supposition.
Q. It might have some effect?
A. It might and it might not.
Q. And if the chain were too long it would have effect?
A. It possibly would, yes, sir.
Q. How many times did the inspector when he came around—how many times did he work at that cutting lever before he opened it?
A. I should judge about five or six times but I didn't count. I didn't count the number of times. I suppose five or six times.
Q. So it didn't come open the first time he jerked it, he had to jerk five or six times?
A. No, he tried it five or six times, but don't get me mixed up on that. I want to tell the truth.
Q. That is all I want you to do and that is all you are expected to do; so that each time the inspector took hold of that cutting lever it opened the knuckle?
A. Yes, sir.
95 Q. Then what did he do? Did he go and close it again?
A. He closed it again and opened it again.
Q. And each time he just gently took hold of it?
A. Oh he didn't gently take hold of it.
Q. Will you say to this jury that he didn't have to jerk a number of times on that cutting lever before that cutting lever opened?
A. I will say this to the jury that that man raised the lever and opened the knuckle five or six times to my knowledge.
Q. The first time he took hold of the lever or did he have to jerk it a number of times?
A. Not an unnecessary jerk.
Q. I am asking you whether he had to jerk more than once?
A. The first time he tried it he opened it.
Q. And after that?
A. Yes, sir.
Q. Each time?
A. Yes, sir.
Q. With just one application?
A. One jerk of the arm.
Q. And did that each time?
A. Yes, sir.
Q. You positively remember that?
A. I certainly do.
Q. And you also remember, Mr. Mulvey, that in your deposition

you stated that the knuckle on the coupler of the tender was open, don't you?

A. That coupler on the tender was open.

Q. And not closed?

A. And not closed.

Q. And you furthermore say that you did not say in your deposition that it was closed?

A. I did not say that that coupler on the tank was closed.

Q. Did you say that you went in and examined, that you examined the chain and the cutting lever to see that they were
96 in good condition, you say that you made such an examination?

A. Examine the chain?

Q. That you examined the mechanism?

A. No, sir, I didn't say that I examined the chain.

Q. Did you observe whether the knuckle and the chain and lock and so forth were in working order?

A. They were in working order.

Q. You went in there and made such an examination to ascertain that did you?

A. I went to see if there was anything wrong with it after the inspector had inspected the coupler.

Q. Now let me ask you this: at the time of taking your deposition I want to ask you whether this question was asked you "Did you observe whether the knuckle and chain and lock and so forth were in working order," just the question I put to you a moment ago, was that question put to you in your deposition?

A. I believe it was.

Q. Did you answer it in this way? "No, I did not go in and examine as to that."

A. That is what I am telling you now, that I didn't examine that chain, make no particular close examination of it, all I wanted to know is that it operated all right, that is all.

Redirect examination.

By Mr. MANCHESTER:

Q. Mr. Mullvey, Mr. Anderson has asked you if that was your signature?

A. No, sir, that is not.

Q. Did you ever see this deposition purporting to be your testimony written out or did you ever read it over?

A. No, sir, I never did.

97 Q. When your deposition was taken there was a stenographer present?

A. There was.

Q. But you say you never saw this after it was written out?

A. No, sir.

Recross-examination.

By Mr. ANDERSON:

Q. That was in Hine, Kennedy & Manchester's office?
A. Yes, sir.
Q. And I was present?
A. Yes, sir.
Q. Stenographer was present and Mr. Manchester was present?
A. Yes, sir, Mr. Manchester was there.
Q. And do you remember that there was an agreement between counsel in which the stenographer was to be allowed to sign the depositions rather than the men themselves?
A. Well I don't know what you people,——
Q. You don't know as to that?
A. I don't know what contracts or agreements you made at all.
Q. You don't know whether there was an agreement of this kind: "It is agreed by and between the parties hereto that the testimony of the witnesses may be taken in shorthand by the stenographer, Miss Agnes G. Henderson, and transcribed by her and that the signature of each witness to the shorthand notes may be signed by the stenographer to his testimony as so transcribed," you don't know as to that?
A. I don't know anything about that.

"That's all."

Defendant then called as a witness to testify in its behalf
98 W. S. RIDINGER, who being first duly sworn testified as follows:

Direct examination.

By Mr. MANCHESTER:

Q. Mr. Ridinger, I believe you are a fireman?
A. Yes, sir.
Q. In the employ of the Erie Railroad Co.?
A. Yes, sir.
Q. And at the time of this accident to Mr. Solomon, you were fireman of the engine on that crew?
A. Yes, sir.
Q. Did you see the accident happen?
A. No, sir.
Q. When did you first learn of it?
A. When Mr. Mulvey said "We hurt the brakeman" I was on the left side.
Q. After the accident was over I will ask you whether your attention was called to the coupler, whether you noticed particularly,——
A. Well I didn't take much notice of it. They had it inspected and they said it was open, that is all I know about it.
Q. You yourself didn't examine it personally?
A. No, sir.
Q. I will ask you how long you worked on that engine as fireman?

A. About a month, I should judge.
COURT: You mean after the accident?
A. After the accident. Well I worked on it two or three weeks I believe after the accident.
99 Q. Did you continue to use that same coupler?
A. Well to my knowledge we did. I don't know. It wasn't reported or anything.
Q. Did you ever know of any trouble or difficulty in the way of using that coupler?
A. No, sir.
Q. Opening it with the cutting lever or making couplings?
A. Well I don't know how to open it or anything. That is out of my line of business.
Q. Did you ever know of any trouble with it?
A. Well not anything out of the ordinary.
Q. What do you mean by out of the ordinary?
A. Well not any more than you have with any coupler.
Q. What difficulty do you have with any coupler?
A. Well sometimes you miss.
Q. Did you ever find any coupler that would make every time?
A. No, sir.
Mr. ANDERSON: That is on the Erie?
Mr. MANCHESTER: Well on any road.

Cross-examination.

By Mr. ANDERSON:

Q. The coupler sometimes missed did it?
A. Well yes, same as the other one, like they all do.
Q. On those switching engines?
A. Yes, sir.
Q. And did you ever see that a man had to go in and line them up?
A. Why not exactly. The man is always on the other side of the engine. I am on the left side you see.
100 Q. And you couldn't see from your position in the cab?
A. No, sir.
Q. So that, but have you ever seen them go in there to line them up with their hand or with their feet?

Defendant objected.
COURT: He may answer with respect to this engine.
Mr. ANDERSON: Well I don't care anything about it.

Q. At the time Solomon was injured did it couple onto the other car automatically upon impact?
A. Well how do you mean?
Q. Well I mean did it couple onto the other car at the time he got hurt?
A. No, sir, it didn't.

Redirect examination.

By Mr. MANCHESTER:

Q. Did your crew continue working with that engine that afternoon?
A. Yes, sir.
Q. After the accident?
A. Yes, sir.
Q. Do you know whether the coupling made next time you tried it after the accident?
A. I couldn't say.
Q. Do you remember whether you coupled onto that car?
A. Yes, sir, we coupled onto it.
Q. With that same coupler?
A. Yes, sir.

Recross-examination.

By Mr. ANDERSON:

Q. Do you know whether it had to be lined up at all?
A. No, sir, I couldn't say.
101 Q. You don't know whether anybody had to go in there and push it over with their foot or adjust it?
A. No, sir.
Q. You have observed couplers on engines, of course?
A. Yes, sir.
Q. If the coupler on an engine was pushed over to the extreme right, we will say clear over right as far as you could push it, and there was a play of four and one-quarter inches at the front end, would it then couple onto the coupler on another car or would it have to be lined up?

Defendant objected; sustained.

"That's all."

Defendant then called as a witness to testify in its behalf D. J. Mc FADDEN, who being first duly sworn testified as follows:

Direct examination.

By Mr. MANCHESTER:

Q. Mr. McFadden, you live in this city?
A. Yes, sir.
Q. Where are you employed?
A. At the Ohio Steel Works.
Q. I wish to ask you whether you were a member of the switching crew at the time Mr. Solomon was injured?
A. How's that?
Q. I wish to ask you whether you were a member of the crew, same crew that Mr. Solomon was a member of when he was injured?
A. I was.
Q. What was your position?

A. I was brakeman.
102 Q. Head brakeman or rear brakeman?
A. I was rear brakeman that day.
Q. Mr. Solomon was head brakeman?
A. Yes sir.
Q. Did you see the accident?
A. No, sir, I didn't.
Q. What first attracted your attention to it?
A. Why I had my back turned to Mr. Solomon; after the engine came against the car I seen it didn't couple on and I saw him laying on the ground.
Q. Now I will ask you whether after this accident occurred you noticed this particular knuckle on the tender of the engine?
A. Yes, sir.
Q. In what condition was it?
A. The coupler on the engine was open.
Q. And how long was that after the accident occurred?
A. Well I should judge right after the accident occurred I noticed the coupler.
Q. Then what,—did you examine it or notice it as to how it would work?
A. Not just then, no, sir.
Q. When did you, if at all?
A. Why I didn't catch that.
Q. What is it?
A. I didn't catch that.
Q. When did you examine the coupler?
A. Right after we started to work with the engine again.
Q. Was that after Mr. Jenkins came back from the hospital, from taking Solomon to the hospital?
A. Yes, sir.
Q. And in what condition was it?
A. Why we found it in working order.
Q. Mr. McFadden, tell the jury whether or not you personally worked the coupler, operated it?
A. It is operated by a lever.
103 Q. How?
A. By a lever.
Q. Well did you do it yourself?
A. Yes, sir.
Q. And when?
A. Why I have been following that right along. I often work it back and forth. I worked at it that afternoon afterwards.
Q. Tell the jury whether you had any trouble in operating it at all?
A. No, sir, I didn't find any trouble with the coupler.
Q. How did you operate it? What did you do in operating the coupler?
A. Why caught hold of the lever and pulled it up.
Q. And would that open the knuckle?
A. Yes, sir.

Q. How long had you been working with that engine before this accident?

A. How's that?

Q. How long before the accident happened had you been working with this engine?

A. I think we had that engine for regular engine right along and I was following the engine. I couldn't say just how long. We had 75 for our regular engine, I know.

Q. Were you able to tell about how long, about how many weeks?

A. I should say a month to be sure about it.

Q. And after the accident happened did you work with this engine?

A. Yes, sir.

Q. Able to tell approximately how long?

A. Well I couldn't say that,—to say just how long afterwards.

Q. About how many weeks if you are able to tell?

A. I think we had it three or four weeks after the accident happened, probably longer.

Q. And on this afternoon of the accident did you continue working with the crew finishing up the switching you had started
104 to do when Solomon was hurt and using this same engine?

A. I didn't catch that.

Q. I say the afternoon of this accident, that is when Mr. Solomon was hurt, did you keep on using this same engine.

A. Yes, sir.

Q. And finish up the switching you had started to do when he was hurt?

A. Yes, sir.

Q. Now tell the jury whether at any of these times you had any difficulty in using this coupler?

A. Why I found no difficulty with the knuckle, found everything in shape.

Q. What was done with this car that you were trying to couple to when Mr. Solomon was hurt, that is after the accident did you couple on to it then?

A. Yes, sir. After the accident we back- down and coupled onto the car again.

Q. Tell the jury whether or not the coupling made the first attempt?

A. Yes, sir, the first attempt it made.

Q. Are you able to give us any idea of approximately how many times you yourself operated that coupler?

A. Oh I couldn't just say. I was operating that lever every day the engine was in there.

Q. How's that?

A. I was running on that crew, I was operating that lever every day. I could say just how often.

Q. Did you ever have any trouble with that coupler?

A. No, sir.

Cross-examination.

By Mr. ANDERSON:

Q. This was a perfectly good coupler, Mr. McFadden, it would couple automatically every time, wouldn't it?

A. Yes, sir.

105 Q. Upon impact?

A. Yes, sir.

Q. Without having to do anything to it, you never had to adjust this coupler by hand did you?

A. Why there was times you might have to adjust it a little one way or the other.

Q. There were times when you had to adjust it is that what you call lining up, is that what you call lining?

A. Well partly, yes, sir.

Q. How would you do that?

A. Why according to their,—they are supposed to stop the engine or stop the cars and adjust those.

Q. How do you do that?

A. With your, either with your hand or your foot.

Q. That is you kick them over?

A. Yes, sir.

Q. Why do you do that?

A. Why there is a play between those knuckles, give it a play both ways.

Q. There is a swing to the drawbar?

A. Yes, sir.

Redirect examination.

By Mr. MANCHESTER:

Q. Mr. McFadden, what do you mean by having to adjust couplers, explain to the jury what that is and how you do it?

A. Sometimes when a car is on a curve this coupler plays back and forth with the cars, generally, and maybe when you cut away from a car the knuckle will be a little out of plumb.

Q. Is that true of all couplers?

Plaintiff objected; sustained.

Q. State in what condition couplers ordinarily are with respect to having side play?

106 Plaintiff objected; overruled; plaintiff excepted.

A. Why generally, on a straight track, they are always in position to couple on.

Q. What I am trying to get at is this. You spoke about sometimes adjusting this coupler, lining it up, as you call it?

A. Yes, sir.

Q. I want to know whether that was true only on this coupler or whether ordinarily, or whether sometimes you have to line up other couplers?

A. Yes, you do.

Q. Is that any unusual condition or defect in the couplers the fact that there is side play?

A. No, sir.

Plaintiff objected; sustained.

Q. Well I will put it this way, Mr. McFadden, what is the fact as to whether couplers ordinarily have side play or not?

Mr. ANDERSON: We admit they have some side play.

A. I didn't get that.

Q. What is the fact as to whether all couplers ordinarily have some side play?

A. Why I guess they are built as standard and have a little play between them.

Q. What is the fact as to whether that is necessary in the operation of trains and coupling of cars?

A. Well I couldn't just say that.

COURT: As I understand counsel in this case it is admitted that it is a necessity?

Mr. ANNDERSON: A certain amount of it, yes, sir.

107 Mr. CONROY: What is the certain amount of it that is necessary?

Mr. ANDERSON: There is no standard fixed by statute. There is a standard fixed as to the up and down but not sideways.

(Argument back and forth by counsel.)

COURT: Wait a moment, gentlemen, evidently you can't agree on that.

Q. What I am trying to get at,—I don't know whether I make myself clear to you, Mr. McFadden, clear to the court and jurors,—is whether or not you ordinarily have side play in couplers, that is where the drawbar goes between the hanger?

A. Yes, sir, it has.

Recross-examination:

By Mr. ANDERSON:

Q. There is some side play in all couplers?

A. Sir?

Q. There is some side play in all couplers?

A. Yes, sir, so far as I know.

Q. How much side play was there on this coupler?

A. I couldn't say for I never measured.

Q. Did you ever line this coupler up on the tender, adjust it by hand or foot?

A. I believe I have.

Q. Now I want to ask you if you were on a perfectly straight track and the coupler on the car was lined properly, in center, but if the coupler on the tender was swung over four and one-half inches, I want to ask you whether or not it would be necessary to line it up before it would couple?

108 Defendant objected; sustained; plaintiff excepted.

Mr. ANDERSON: We except on the ground that this is proper ground of cross examination and that the matter had been gone into in chief, and that this man is an expert.

"That's all."

Defendant then called as a witness to testify in its behalf ELMER TIMS, who being first duly sworn testified as follows:

Direct examination.

By Mr. MANCHESTER:

Q. Mr. Timms, you are a brakeman in the employ of the Erie Railroad Co.?
A. Yes, sir.
Q. And were you employed by that company as brakeman at the time Mr. Solomon was injured?
A. Yes, sir.
Q. I will ask you if you were present when the accident occurred?
A. No, sir.
Q. When did you arrive there?
A. They had taken the man that was hurt to the hospital when I got there.
Q. And what work did you do after you got there?
A. I took his place, as head brakeman.
Q. Took his place as head brakeman of that crew?
A. Yes, sir.
Q. Now how soon after you got there did you start to work?
A. Well I should say within about fifteen minutes.
Q. Do you know how long that was after the accident?
A. No, sir, I don't know what time he was hurt.
109 Q. What was the first thing you did after you started to work?
A. Why Mr. Wheeler and I we were standing there and we opened the coupler on the engine and closed it and opened it again and left it open and when we started to work we back- the engine up and,——
Q. When did you start to work?
A. About 2:20.
Q. How did you open the knuckle?
A. Pulled the lever up on the engine and the knuckle on the car was already open and I don't remember whether we pushed the car back or pulled it up.
Q. Tell the jury whether or not the coupling made the first time?
A. Yes, sir.
Q. Now tell the jury when you were working the cutting lever and when Mr. Wheeler was there whether or not you found anything the matter with the coupler?
A. Well I didn't find anything wrong with it when I worked it.
Q. Did you continue to work the rest of the afternoon?
A. Yes, sir.
Q. Did you use that same coupler?
A. Yes, sir.

Q. Tell the jury whether or not you had any difficulty with it?
A. Well that is pretty hard to say, all through. You know a man don't pay much attention. It is a common occurrence to miss a coupling on an engine.
Q. I mean outside of any ordinary difficulty of that kind?
A. No, there wasn't any trouble. If we didn't make a coupling the first time we would try the second time.
Q. Was there any trouble in operating the lever on this coupler?
A. Not that I noticed.
Q. Would it open the knuckle?
A. Yes, sir.
110 Q. You think all couplers sometimes miss?
A. I mean that I never seen a coupling yet on the railroad that when you pull the operating lever it kicked the knuckle open every time. There was always some time or other it would miss.
Q. Did you ever work with this engine any other time?
A. The night before.
Q. Did you then operate this bar?
A. Yes, sir, we used her all night the night before, the night of June 1st, we used her on the high speed trestle jump.
Q. Did you then have any difficulty with it?
A. Not that I noticed.
Q. Did you work with this engine afterwards any time you remember of?
A. I think we used her five days but I haven't the dates here.
Q. During any of the time you worked with it did you have any trouble with this coupling?
A. Not that I remember of.

Cross-examination.

By Mr. ANDERSON:

Q. Mr. Timms, you were called to take Mr. Solomon's place, weren't you?
A. Yes, sir.
Q. When you first came to that tender how do you say the knuckle was, open or closed?
A. Knuckle was open.
Q. And Mr. Wheeler was there, wasn't he?
A. Yes, sir.
Q. Who is Wheeler?
A. He is claim agent of the Erie Railroad.
Q. He was there, was he, when you came?
A. Yes, sir.
111 Q. And you came about 3:20?
A. No, I came a little earlier than 3:20. We started to work about 3:20.
Q. But at the time you came the knuckle was open?
A. Yes, sir.
Q. But whether or not it had been opened by anyone,——
A. I do not know.

Q. In fact, the fact is there were men around there?
A. Yes, sir, three or four men.
Q. Those men were around that coupler?
A. They were around the back of the engine.
Q. Some of those men were working with the knuckle, were they not?
A. Well there was one gentleman was measuring the height of the coupler and the play in the drawbar on the back of the engine.
Q. Do you know what that play was?
A. No, sir.
Q. You didn't measure it?
A. No, sir.
Q. And whether or not anything had been done to the chain or the cutting lever between the time that Solomon,—or the knuckle,—between the time that Solomon got hurt and the time you got there you don't know, do you?
A. No, sir.
Q. Were there any springs or any shims or anything of that kind to keep the coupler in position?
A. No, sir, I didn't see anything in there to hold the coupler rigid. They are supposed to swing back and forth.
Q. How much?
A. I don't know what the law requires.
Q. Would you say as much as four and one-half inches?
A. I wouldn't say anything because I don't know.
Q. All you wish to say is that they have some play?
A. Yes, sir.
112 Q. The greatest play however, Mr. Tims, is not in the drawbar, but it is between the two knuckles, isn't that correct?
A. Well it must play some by the engine, you know in order to swing the end of it out, that is where the play is supposed to be, out at the end in order to couple cars on curves.
Q. But as a matter of fact isn't the coupler made after the grasping of the hand?
A. Yes, sir.
Q. Isn't the great play in there rather than out there in the——
A. No, sir, I don't think it is. I think that opening the knuckles, of course, you are more apt to couple on with both knuckles open than with one but there must be a swing in the drawhead in order to couple on on a curve, but you see there is only a small swing where it couples onto the engine but out at the end there is more swing.
Q. Is there as much swing on the cars as there is on this switch engine?
A. Well there is supposed to be. There is supposed to be a standard. The engine and car is supposed to have the same standard and I don't know what it is.
Q. Tell us what that standard is?
A. I don't know.

Q. Now from your observation I want to ask you whether the ordinary type of cars, how much swing they have at the front end?

A. That is pretty hard to answer on account of different makes of cars. Every company that makes cars makes them different. Some have springs stretched in there outside of the shank on the drawhead and you can't move them on that.

Q. Let me ask you what is the object of those springs?

A. To hold the coupler in the middle of the car.

Q. Were there any springs on this switch engine to hold it in the center?

A. No, sir, not on the back of that engine.

113 Q. Now when you coupled on that other car was the drawhead in position, was it in center when you started to couple?

A. It seemed to be, because we back- up and made the coupling the first time.

Q. You didn't have to adjust it with your hand or your foot?

A. I didn't touch the car at all.

Q. You didn't touch the knuckle or drawbar of your engine?

A. It was open and we closed and opened it again and it was adjusted in the center and we coupled the first time.

Q. Have you ever operated that switch engine when it wasn't on center?

A. No, sir.

Q. Then how did you put it into center?

A. Well I don't know whether I used my foot or my hand. If you are on a curve you would have to adjust it in order to make a coupling on the curve.

Q. You would some time, even on a straight track, have to push it over with your hand or foot?

A. If the knuckle of the car was closed that you was going to couple on to you would have to adjust the drawbar.

Q. How did you do that?

A. Either with my hand or foot.

Q. Was there any way, Mr. Tims, that you could do it from the side of the tank?

A. No lever to pull it out. You would have to do it either with your hand or foot.

Q. You would do that while you were on the engine?

A. Yes, sir, while you were riding on the engine.

Q. That would be while the engine was in motion?

A. Yes, sir.

Q. So that in order to make it couple automatically with the other car you would have to get in there to adjust it with your

114 hand or your foot?

A. Well you are in there all the time when you are riding.

Q. But you couldn't do it from the outside without getting hold of it with your hand or foot?

A. No, sir.

Redirect examination.

By Mr. MANCHESTER:

Q. In speaking of adjusting the coupler do you refer to this particular coupler or all couplers?

A. I am referring to any coupler.

Q. Mr. Anderson spoke to you about the method of adjusting couplers about going between cars, do you know what the rule of the company is?

A. Yes, there is a rule, I one time read a bulletin posted where the cars had to be at least ten feet apart before stepping in between them.

Q. Where was that bulletin posted?

A. Well different yard offices it was posted in.

Q. Are there regular bulletin boards?

A. Well I don't know whether there are now or not.

Q. At that time, I mean?

A. Yes, sir, there were bulletins at that time.

Q. And are the employees supposed to pay attention to those bulletins?

Plaintiff objected.

Q. Is that part of their duty?

Plaintiff objected.

Q. What is the fact as to whether or not the employees are required to pay attention to those bulletins?

A. Why they are supposed to live up to the rules.

115 Q. And when was it you saw this bulletin posted?

A. I don't remember that.

Q. What is it?

A. I don't remember the date.

Q. Was it before or after this accident?

A. Well I can't say about that either.

Q. What was the rule?

A. Well it is said the cars had to be apart ten feet before a man stepped in between them to adjust couplers.

Q. And when, then, would any adjusting of the couplers have to be made, under that rule?

A. If you were riding on the footboard of an engine by that rule I should take it that a man would have to adjust a coupler before he came within ten feet distance of the car.

Q. Mr. Tims, I will hand you this paper marked "Defendant's Exhibit 2" and ask you if that is a copy of the bulletin to which you refer?

A. Yes, sir, that looks like one of them.

Q. Are you able to tell what bulletin board you saw that on?

A. I saw that in Mr. James's office.

Q. Where is his office?

A. General yardmaster's office in the freight house at Holmes Street.

Q. Is that a regular place?

A. That is one of the regular places.
Q. For posting bulletins?
A. (No response.)

Recross-examination.

By Mr. ANDERSON:

Q. When did you see this?
A. Well I don't know. I think I was working on the extra list at that time, I saw that.
116 Q. And you were required by a book of rules to look at those bulletins?
A. Well I can't say that.
Q. Have you a book of rules?
A. Yes, sir.
Q. You were furnished with a book of rules?
A. Yes, sir.
Q. By the Erie Railroad Company?
A. Yes, sir.
Q. When you went to work?
A. Yes, sir.
Q. And you were to abide by that book of rules?
A. Yes, sir.
Q. Now the bulletin that you speak of that hung up in this office, did it?
A. Yes, sir, on the bulletin board.
Q. How many bulletins hung up on that bulletin board at that time?
A. I couldn't say that.
Q. Well tell us.
A. Quite a few.
Q. Well approximately?
A. I couldn't say.
Q. How many were on top of that one?
A. Well I don't remember that either, how many were on top of that.
Q. But there was a great bunch?
A. Yes, sir.
Q. And in order to read those things you would have to go and read that thick bunch in order to find them all there?
A. There was quite a few of them.
Q. And they hand you out a bulletin there every once in a while or hand out a bulletin?
A. Yes, sir.
Q. And they paste one right on top of the other?
A. They are filed one on top of the other.
Q. So that you have a great thick bunch of them on there?
A. There is quite a few of them there sometimes.
Q. And when you go in there are you required or I mean when you go in there do you go to work and read first one and then the other from the bottom to the top?

A. No, sir.
117 Q. Do the other men?
A. I don't know.
Q. Have you observed?
A. No, sir, I never took notice to what the other men did.

Redirect examination.

By Mr. MANCHESTER:

Q. Mr. Tims, these bulletins are posted up from day to day are they not?
A. Yes, sir.
Q. Not all in a bunch?
A. No, sir, the bulletin,—different times there is one pasted and then another and another and the first thing you know there is a bunch of them.
Q. Mr. Tims, when you were employed and got your book of rules did you sign a receipt?
A. I signed so many papers I can't say whether there was a receipt there for a book of rules or not.
Q. But you got a book of rules?
A. Yes, sir, I got a book of rules and switch key and lamp.

Recross-examination.

By Mr. ANDERSON:

Q. Mr. Tims, the drawbars on cars, you say you have to adjust them do you, that is go and push them over with your foot?
A. It is not necessary to push them over with your foot but that is a habit that railroad men have got into; but when you push it over with your hand you have to get in this way with your side and that is more dangerous than with your foot.
118 Q. So it is less dangerous to push them over with your foot?
A. Well not less dangerous,—you get more leverage, you get a better kick on the knuckle.
Q. That is a habit that the railroad men have gotten into?
A. Yes, sir, kicking the drawbar over.

Defendant objected; and asked that answer be excluded.
COURT: I will reserve the question for a moment. (See ruling on page 277.)

"That's all."

Defendant then called as a witness to testify in its behalf J. M. STOKES, who being first duly sworn testified as follows:

Direct examination.

By Mr. CONROY:

Q. What is your name?
A. J. M. Stokes.

Q. Where do you work, Mr. Stokes?
A. I am employed as brakeman at present for the Erie railroad.
Q. How long have you been working for that company?
A. I have been working on and off for fifteen years, been away twice.
Q. Always as brakeman?
A. No, sir, I have been employed a good deal of the time as a conductor.
Q. Did you ever work with engine 75?
A. Yes, sir.
Q. Are you familiar with the coupler on the tender of that engine?
A. I was when I was working regular, at the time I had been working with her.
119 Q. Do you remember the occasion of Mr. Solomon being injured while working with engine 75?
A. I heard of it.
Q. And did you work on the crew of that engine before he got hurt?
A. Yes, sir, I worked before the accident.
Q. And did you work on that engine or with the crew of that engine afterwards?
A. Well no, not with the crew afterwards. I worked on,——
Q. Well not the crew but with that same engine?
A. Yes, sir.
Q. In the course of your work did you have occasion to use and operate the coupler on that engine?
A. Yes, sir.
Q. On the tender?
A. Yes, sir.
Q. Tell the jury what difficulty if any you had in operating that coupler?
A. Well I didn't have no more trouble of operating that coupler that I would of any other coupler. The couplers all about work the same.
Q. In operating that coupler how would you open the knuckle?
A. I lifted the operating lever.
Q. And when you lifted the lever would the knuckle open?
A. Well occasionally it may not open by the first jerk.
Q. What would you do then?
A. I would jerk it,—give it another jerk and if it wouldn't open then I would take my hand and shove it over,—shove it open.
Q. Are you speaking of the coupler of this engine 75 or generally?
A. Generally, that is the general way of most all couplers.
Q. Did you act as a brakeman with this engine 75?
A. Previous to this accident I broke behind this engine.
120 Q. Did you have occasion any time to couple this engine onto cars?
A. Yes, sir.

Q. Did you have occasion to use the coupler on the tender in doing so?

A. Yes, sir.

Q. Would the knuckle open by using the lever?

A. Occasionally it would open,—sometimes when I would jerk—open it to,—jerk the operating lever to open up that kniuckle it might open too far and might not open far enough, it has got to be adjusted.

Q. And does that depend on how hard you jerk it?

A. Yes, sir.

Q. And if it became necessary to open the knuckle with your hand or to adjust the drawbar itself into proper position what is the rule of the company as to when you would do that?

A. Why you must do it when the engine is not in motion.

Q. Are you familiar with rule 266 of the company upon that subject?

A. Yes, sir, in regards to stopping to adjust the coupler.

Q. And the ten foot limit?

A. Yes, sir.

Q. And what is the rule in reference to the ten foot limit?

A. Why they must stop.

Mr. ANDERSON: Just a moment, have you got a book of rules?

A. Not with me, I haven't.

Q. Have you had a book of rules?

A. Yes, sir.

Q. Furnished you by the company?

A. Yes, sir.

Q. And are you familiar with that rule upon that subject, known as rule 266?

A. Well I am familiar with all the rules of the company but not exactly in numbers.

121 Q. The rule I mean is the one in reference to which you were speaking of the ten feet,—

A. Yes, sir.

Q. And were you familiar with the bulletin that was posted upon that subject?

A. Yes, sir.

Q. Showing you paper marked "Defendant's Exhibit 2" I will ask you if you observed that rule posted upon the bulletin board anywhere?

A. I have read a bulletin the same as this one.

Q. Where are the bulletin boards on the Erie?

A. There is bulletin boards in all yardmaster's offices or any places where it can be seen by the employees, where they frequently,——

Q. Are the employees required to take note of that?

A. Yes, sir, we are supposed to read all bulletins, be familiar with them.

Q. Did this coupler on engine 75, that is on the tender of engine 75, did it have some side play?

A. Yes, sir.

Q. What is the fact as to couplers generally having side play or not?

A. All couplers has a side play for movable or side motion.

Q. And is that necessary in the operation of trains by reason of the curves and other conditions?

A. Yes, they have to be so you can adjust them on curves.

Q. Are you able to tell the jury whether or not you saw a bulletin of a like character as the one you have read, before the Solomon accident?

A. How's that please?

Q. Are you able to tell the jury whether or not you saw a bulletin like the one you just read before the accident to Mr. Solomon?

A. No, sir, I couldn't exactly say whether it was before or afterwards; I couldn't just say that.

122 Q. All you know is that you did read a bulletin of that kind?

A. Yes, sir.

Q. But you didn't fix the time in your mind?

A. No, sir.

Q. After the Solomon accident you say you worked with this engine?

A. Yes, sir.

Q. And used the coupler on the tender?

A. Yes, sir.

Q. Was the handle on that lever bent any?

A. I don't mind if it had been bent.

Q. Was the bar as it ran across the back of the tender, was that bent or sagged in some?

A. The operating lever?

Q. Yes?

A. I couldn't say to my knowledge.

Q. Showing you photograph marked "Plaintiff's Exhibit A" I will ask you if the lever and knuckle there is substantially correct as to the lever and knuckle of engine 75?

A. Yes, sir.

Q. Did you observe at any time as to whether the chain attached to the pin was too long or too short?

A. No, sir.

Q. And in coupling onto other cars from time to time either on curves or on straight tracks did you have occasion to adjust the position of the drawbar?

A. Yes, sir.

Q. How would you do that?

A. Well I would shove it over.

Q. With you hand or foot?

A. With my hand or sometimes with my foot.

Q. And in doing that would you observe the rules of the company?

A. No, sir. Occasionally I would disobey it. I wouldn't live up to the rule.

123 Q. The rule however was that it should be adjusted before you came within ten feet of the car which you were going to couple onto?
A. Yes, sir.

"That's all."

Defendant then called as a witness to testify in its behalf WILLIAM OWENS, who being first duly sworn, testified as follows:

Direct examination.

By Mr. MANCHESTER:

Q. Mr. Owens, I believe you are employed by the Erie Railroad Company?
A. Yes, sir.
Q. And for how long have you been employed by it?
A. It will be two years this coming March.
Q. What work do you do?
A. Yard brakeman.
Q. I will ask you, Mr. Owens, whether you in the course of your work as brakeman have worked with engine 75?
A. Yes, sir.
Q. When was that.
A. February 7th, 8th and 9th.
Q. Have you worked with that engine at any time since that?
A. No, sir.
Q. February 7th, 8th and 9th, and you haven't worked with it since that time?
A. Not that I know of.
Q. Mr. Owen, are you sure about the months now you worked with it?
A. If I ain't mistaken, my time book says February 7, 8 and 9th.
Q. Have you got your time book with you?
A. No, sir, it is at home.
124 Q. I wish you would examine your time book and see just when it was and I will excuse you until you satisfy yourself as to when it was you worked on that engine.

"That's all."

Defendant then called as a witness to testify in its behalf GEORGE J. JOHNSON, who being first duly sworn, testified as follows:

Direct examination.

By Mr. CONROY:

Q. What is your name.
A. George J. Johnson.
Q. Where do you work?
A. Erie Railroad Co.
Q. What do you do?

A. Conductor.
Q. How long have you worked for the Erie Railroad?
A. Five years the 12th of next month.
Q. How long have you been a conductor?
A. I was promoted two years last August.
Q. Before that you were a brakeman?
A. Yes, sir.
Q. As a brakeman did you ever work with engine 75?
A. Why I worked with her as conductor.
Q. And do you remember the occasion of Mr. Solomon being injured?
A. Yes, sir, I mind hearing about it.
Q. Did you work on engine 75 as a conductor before or afterwards?
A. Why I worked on it afterwards as conductor.
Q. How soon afterwards?
A. Seventh, eighth and ninth of August and I had her from the 7th to the 10th of November nights.
125 Q. While you were working on that engine were you familiar with the coupling apparatus on the tender of that engine?
A. Yes, sir, the job we had over there, our work was all on the hind end of it.
Q. Did you ever operate the coupler yourself?
A. Yes, sir.
Q. And did you observe others operating it, brakemen?
A. Yes, sir.
Q. And when you operated it how did you open the knuckle?
A. Pulled the lever up.
Q. Would that open the knuckle?
A. If you jerk it hard enough it would spring back, of course if you didn't jerk it so hard it wouldn't fly open, it was an automatic coupler.
Q. Was there anything wrong with the handle or lever?
A. No, sir.
Q. Anything wrong with the chain?
A. No, sir.
Q. Anything wrong with the knuckle?
A. No, sir.
Q. While you worked there did you couple onto other cars with that coupling?
A. Yes, sir.
Q. Have any trouble doing that?
A. No, sir.
Q. Has the coupler on engine 75 a side play in the collar?
A. It is a standard Climax coupler,—what the standard is.
Q. Has it side play?
A. Yes, sir.
Q. And what is the fact as to all couplers having such side play or not?
A. They all have standard, two and one-half inch is the standard.

Q. And is that necessary in the operation of trains around curves and so forth?

A. Yes, sir, it has got to have that side play to couple on on curves and straight tracks. It has got to have it. Cars run-
126 ning around curves, if they didn't have it it would either throw them off the track or break the flanges of them.

Q. And when your engine is backing up for the purpose of coupling onto a car is it necessary that the brakeman observe as to whether the couplers are in position?

A. Yes, sir.

Q. To make the coupling?

A. Yes, sir.

Q. And if they are not in position is it the duty of the brakeman to put the drawbar in position?

A. Yes, sir.

Q. And is there a rule of the company covering that subject, as to when he shall do that?

A. Yes, sir.

Q. Have you a book of rules of the company?

A. I haven't it with me. I have it at home.

Q. Furnished to you at the time you went into their employment?

A. Yes, sir.

Q. And was it your duty to familiarize yourself with those rules?

A. Yes, sir.

Q. And are you familiar with rule 266 upon that subject?

A. I have read it.

Q. Showing you a paper marked "Defendant's Exhibit 2" I will ask you to read that and state to the jury if you read that paper when it was posted upon any of the bulletins of the Erie Co.?

A. Yes, sir, I read it. I mind when this bulletin came out,—was posted,—called their attention to the rule.

Q. On what bulletin board did you see —?

A. Saw it over *over* at the general yard office.

Q. Where is that?

A. Holmes Street.

127 Cross-examination.

By Mr. ANDERSON:

Q. What did you say your position was with the Erie?

A. I am a conductor.

Q. You worked with engine 75 when was that?

A. Seventh, eighth and ninth of August; 9th to 10th of November nights.

Q. 7th, 8th, 9th and 10th, was it not? That is what I thought you said,—I don't care about it,—my record shows 7th to 10th, I may be mistaken, at any rate you worked on the rear end of this engine didn't you?

A. Yes, sir.

Q. And this coupler on the rear end you say that was,—that would couple automatically upon impact with other cars?

A. Yes, sir.

Q. Without men having to go in and adjust it in any way?

A. Oh you would have to adjust it. You have to have one open all the time and maybe the one on the car would be closed and this one would be closed, you have to have one open.

Q. How would you open it?

A. Pull up on it and if you pulled strong enough on it it would fly open itself, lots of time, if you didn't use as much strong arm on it it wouldn't open,—you would have to kick it open or shove it open with your hand.

Q. Was it so tight that you couldn't strong arm it as you say,—what was the reason that you couldn't open it with the cutting lever?

A. Well I don't know but it is the way you pull them. If you just pull up nice and easy and lift the pin out it would stay
128 there but if you would give it a good jerk it would save the trouble of using your hands to open it.

Q. Was there any way of opening it from the side? Would it always come open from the side?

A. There was a cutting bar there.

Q. What was the matter with the cutting bar that it wouldn't open the knuckle?

A. There was nothing the matter with it.

Q. Why didn't it open then? Why did you have to strong arm it as you say?

A. Everybody wouldn't pull it as hard as I would.

Q. Did you never have to go in and adjust it with your hand?

A. Certainly, lots of times you wouldn't give it a jerk, I would just open it easy and would have to take my hand and open it.

Q. In other words you couldn't open it by means of the cutting lever and then you would have to go in and open it with your hand, isn't that a fact?

A. If you jerked it hard enough it would fly open automatically.

Q. How hard would you have to do that, all your might and main?

A. Just give it hard enough to make it fly open.

Q. She was pretty tight sometimes, wasn't she?

A. No, sir, I didn't notice it tight.

Q. I don't understand yet as to why you would have to go in there and open it with your hands if you could do it by means of the cutting lever, will you explain it?

A. Lots of people wouldn't give it as hard a jerk maybe.

Q. Well I am talking about you, when you were on it, why did you have to go in and open it with your hand?

129 A. Well I didn't always have to. Sometimes when I jerked it hard enough it opened itself; other times I didn't jerk it so hard and it wouldn't fly open.

Q. Couldn't you give it a second jerk?

A. You could if you wanted to but maybe you wouldn't always

do that. You would stand there and maybe touch it with your foot and open it.

Q. Wouldn't a second jerk open it when the first one missed?

A. Well you wouldn't get the spring on it on the second one as hard as the first one after it was open a piece.

Q. So that if you failed to strong arm it the first time you may not be able to do it the second time because you wouldn't get much spring in?

A. When you throwed it open the first time it might not go far enough you would have to gauge them to strike just right. If you wouldn't run it clear open you have to set it.

Q. In fact sometimes you couldn't open it by the cutting lever from the side and you would have to go in and adjust it with your hand?

A. Sometimes.

Q. With your hand or with your foot?

A. Yes, sir.

Q. And you did that from the running board?

A. Yes, sir.

Q. And you didn't wait until you got within ten feet of the other car did you?

A. Not always.

Q. If the cutting lever or the part of the cutting lever that runs across the back of it there if that was sagged down in any way, that would have some effect on the opening of the knuckle?

A. You mean if it was out of order?

130 Q. Yes, if it was sagged down would that be out of order?

A. Well it would give it more play maybe, give you more leverage if it was sagged down.

Q. So that it might not open so well if it was sagged down?

A. You could jerk it just as hard. There would be just that much more room to throw it open.

Q. What about the chain, if that were too long or had too much play in it?

A. Oh, if that was too long,——

Q. Do you know what the reason was that you sometimes couldn't open this knuckle by means of the cutting lever from the side, do you know of the reason for it?

A. Sometimes, you mean one that was out of order.

Q. This one we are talking about.

A. I never said it was out of order. When I used it it worked all right.

Q. You considered it working all right when you had to go in and open it with your hand?

A. Well that was my fault if I didn't jerk it hard enough.

Q. Was this two and one half inches of standard play, was that at the front end of the coupler or where?

A. No, sir, at the collar.

Q. And by what authority do you say that two and one half inches is a standard?

A. Why, I don't,——
Q. How did you learn it?
A. You heard of the standard,——
Q. What?
A. You know the standard of the coupler.
Q. You know the standard of the coupler there? This was a Climax coupler wasn't it? And two and one-half inches you say is the standard, you say that?
A. Yes, sir.
131 Q. And where did you learn that that was the standard?
A. Oh if the car inspectors say so.
Q. What car inspectors have you heard say that two and one-half inches was the standard side play?
A. I have heard lots of them.
Q. Tell me one?
A. I don't know just now.
Q. Tell me one that said that two and one-half inches was the standard side play of drawbars of any couplers, Climax or any other?
A. I have heard men say that,—car inspectors of good authority, but I don't know as I have to tell you their names.
Q. What about drawbars on cars, how much side play do they have?
A. Oh I don't know, different side play to different makes of cars.
Q. What?
A. Different makes of cars whatever they are.
Q. So that different cars have different degrees of side play?
A. I don't know, supposed to.
Q. That is the standard is different in different cars?
A. I don't know for sure about that, about cars. I know about the engines.
Q. You are talking about engines?
A. Yes, sir.
Q. You are not talking about the play in cars but you are talking about the play in engines?
A. Yes, sir.
Q. And two and one-half inches is the standard in engines?
A. This engine.
Q. Oh, in this engine, oh yes, now I understand you, two and one-half inches of side play is the standard on this particular engine.
A. Yes, sir.
132 Q. But you don't say that that is a standard on other engines, do you?
A. No, sir. Other engines has different couplers maybe. I don't know anything about other engines or coupler, I know about this one though.

Redirect examination.

By Mr. CONROY:

Q. On this Climax coupler you are speaking of?
A. Yes, sir.

Q. Now you say, Mr. Johnson, that at times when you wouldn't jerk hard enough or jerk the lever properly, the knuckle wouldn't open perhaps as you wanted it to?

A. No, sir.

Q. And on occasions of that kind why you would go in and adjust it with your hand?

A. Yes, sir.

Q. If you have time to do it?

Plaintiff objected; sustained.

Q. Would you adjust that with your hand or foot?

A. Oh sometimes take my hand and sometimes my foot.

Q. And there was a rule of the company upon that subject?

A. Yes, sir.

Q. And when you spoke of adjusting couplers and operating the levers were you speaking of this coupler on 75 or couplers generally?

A. Coupler 75, on this one individual engine.

Q. This particular jerk that you speak of used in operating the lever was that true of 75 only or of others?

A. There is others that work the same. Some of them that when you jerk it hard it won't come clear open.

133 Q. How is it if you jerk them too hard, if the knuckle would open too much it will swing back and close?

A. Sometimes if you jerk it too hard it might hit over there and come clear back where you didn't want it to. You size it up, the condition of the track, the curve as straight, and you have to set your knuckle to what you think would meet.

Q. And I suppose these drawbars having a play of about two and one-half inches, that the position of the drawbar in the collar varies at different times depending upon what kind of tracks you are running on, curves and so forth?

A. Yes, sir, maybe a track will curve that way or curve the other way. You would need the play you had to pull it this way or if the track was reversed, curved the other way, maybe you would need the other side and maybe you would have to pull the other one the required slack that was in it the same.

Q. And if the car was standing on a straight track and your engine was backing down on the straight track to make a coupling all a man on the footboard would have to do would be to see that his drawbar was in the center?

A. Yes, sir.

Q. And he can do that at any time before he gets within close proximity to the standing car?

A. (No response.)

Q. These knuckles you can open with one hand can you not?

A. Yes, sir.

Q. And how is the fact as to when an engine was standing still, some distance away from the car that was standing still, you were going to couple onto that car and the head brakeman adjusting his knuckle before the engine started?

A. Yes, sir, I suppose he would have it set ready to make.

134 Recross-examination.

By Mr. ANDERSON:

Q. Supposing you were two car lengths and a half away from the other car you were going to couple onto, could you tell whether the drawbars would be properly lined?

A. If you were two car lengths away and would see the car standing down there with the knuckle shut, your knuckle was shut, you would open the one on the engine.

Q. But as far as being lined up too much to one side or the other, could you tell that?

A. No, sir, you couldn't tell that. You could tell that as you came onto it.

Q. You could tell that as you draw up to the car?

A. Yes, sir.

Q. But you couldn't tell it before?

A. No, sir.

Q. There is a coupler shown as Janey coupler?

A. Yes, sir.

Q. What is the standard play of the Janey coupler?

A. I don't know.

Q. Now, the coupler is fastened to the drawbar, isn't it? To the front end of the drawbar?

A. Yes, sir.

Q. And as a matter of fact the play that we have talked about isn't in the coupler at all, it is between the drawbar and the collar that it hangs in?

A. It is the yoke there that fits the collar like.

Q. What is that?

A. It fits in there, it is in the collar like.

Q. Point out to the jury the collar.

A. That is it right in here.

135 Q. This part here is the coupler, isn't it?

A. That is the knuckle.

Q. That is the knuckle and this is the coupler?

A. This is the coupler.

Q. And this is the chain and this is the cutting lever?

A. Yes, sir.

Q. Now then the two and one-half inches you speak of on this, the standard on this engine is from this point to that point?

A. Yes, sir, when it is shoved clear over.

Q. Now then you say that is standard of this engine?

A. Yes, sir.

Q. Now what has that collar got to do? That collar isn't part of the coupler, that is simply to hold the coupler in place?

A. That is the carrying bar.

Q. If this carrying bar were over further there would be more play wouldn't there?

A. (No response.)

Q. Do you notice the shim down there under, on there?

A. In under there, yes, sir.

Q. What other types of couplers are there?

A. Janey, Towers, Muttons.

Q. Can you tell us the standard play in any of those others? Can you tell us the standard on Erie switch engines?

. (No response.)

Q. Do any other Erie switch engines use any other kind of couplers?

A. They have different couplers, yes, sir.

Q. Can you tell on other Erie switch engines then what is the standard of play?

A. Two and one-half inches, I guess.

Q. What?

A. Two and one-half inches.

136 Q. On other couplers.

A. Why on this coupler is what I am talking about, this Climax.

Q. Now I am asking you about other couplers,—do you know what the standard of play is on other couplers?

A. About other couplers?

Q. Yes, what is the standard in other couplers, not the Climax, but others?

A. I suppose the standard is two and one-half inches.

Q. You suppose, do you know?

A. I am not sure, that is the standard.

Q. You think it is 2½ inches?

A. Yes, sir.

Q. Talking about engine 75, from the few days that you observed her and talking about the coupler on the rear end of the tender, I want to ask you whether or not when that coupler was pushed clear over to the right side or clear over to the left side, whether she would make with a coupler on another car or whether she would have to be adjusted?

Defendant objected; overruled.

COURT: He may answer as to what he observed as a matter of fact. Did you ever see that thing tried out on that particular observation?

A. I don't just understand the question.

Q. Did you ever have to push the drawbar over, adjust her or line her up on the back end of this tender?

A. Push it over as far as you could.

Q. Yes.

A. Oh yes, lots of times on a curve we had to shove it clear over.

Q. If the drawbar were pushed clear over to one side on a straight track, would it make with the coupler on another car without having to be pushed back.

137 A. It might have been cut off when the car was on a curve and left clear over there and when you came onto a straight track you would have to adjust it according to how you thought the knuckle stood.

Q. How would you do that?
A. Either pull it over with your hand or shove it over with your foot.
Q. Was there any way to do it from the side of the tank?
A. No, you would have to adjust it with your hand.
Q. So that there was no device or mechanism that you could do it with except by the hand or the foot?
A. On some drawbars and couplers there is a spring that will throw them back.
Q. Was there any on 75?
A. I don't think there was.

"That's all."

Defendant then called as a witness to further testify in its behalf THOMAS JENKINS, who having been previously sworn, testified further as follows:

Direct examination.

By Mr. MANCHESTER:

Q. Mr. Jenkins, I will show you this writing marked "Defendant's Exhibit No. 2" being a copy of a bulletin, and ask you if you ever saw that bulletin posted?
A. Yes, sir, I have saw a bulletin to that effect.
Q. Where was it you saw it posted?
A. At the general yard office.
Q. Where is that?
A. Holmes Street.
138 Q. Is that Mr. James's office?
A. Yes, sir.
Q. When was it you saw it?
A. Well it was, I would judge in March or April I wouldn't say which. I read the bulletin there.
Q. Preceding this accident?
A. Shortly after the bulletin was put up.
Q. When you say March or April you mean what year?
A. 1911.

Cross-examination.

By Mr. ANDERSON:

Q. How are these bulletins fastened or put up?
A. They are put up on a steel contrivance there on the wall that they had them on I believe they call it a file.
Q. Tell us whether or not they are spread out over the bulletin board or in, one right over the other in a kind of a pad?
A. Hang them up on the bulletin board as they get them.
Q. In a kind of a pad one on top of the other?
A. Yes, sir, they would be one on top of the other.

Q. As the bulletins come out, and as you pass into these offices you read the bulletins that have just been posted, do you not?
A. Yes, sir.
Q. Do you go down and read all the others under that?
A. I usually read them as far back till I see one that I remember that I have read before. That is my way of doing it.
Q. But as bulletins are posted on this pad, how many would you say on this particular pad?
A. I don't know the number.
Q. About?
A. I don't know the number.
139 Q. Give us an estimate.
A. That I couldn't say.
Q. About how thick is that pad?
A. I couldn't say how many was on there because I never counted them.
Q. An inch in thickness?
A. I don't suppose they would be. They might have been more than that and might have been less.
Q. And as these bulletins come from the headquarters they are posted on this pad and as men pass by they read usually the latest bulletin, do they not?
A. Yes, sir.
Q. And then others are posted over that, covers those over,—is that correct?
A. Yes, sir.

Redirect examination.

By Mr. MANCHESTER:

Q. Mr. Jenkins, where are all of these bulletins posted?
A. They are posted at all yard offices. There is regular bulletin boards appointed at different places.
Q. What is the purpose of them?
A. To keep the employees instructed as to the different bulletins.

"That's all."

Defendant then called as a witness to testify in its behalf W. J. ROGERS, who being first duly sworn, testified as follows:

Direct examination.

By Mr. CONROY:

Q. What is your name?
A. W. J. Rogers.
140 Q. And you work for the Erie Railroad Co?
A. Yes, sir.
Q. In what capacity?
A. Brakeman.
Q. How long have you worked for the Erie?

A. A little over nine years.
Q. As brakeman?
A. Most of the time.
Q. Have you worked with engine 75?
A. Yes, sir.
Q. As brakeman.
A. Yes, sir.
Q. Rear or front brakeman, head brakeman?
A. Head brakeman.
Q. Do you remember the occasion of Mr. Solomon being injured?
A. I remember of it.
Q. Did you ever work on the train crew, on any train crew with engine 75 before that accident?
A. Yes, sir, I have worked before that time.
Q. And did you after that with engine 75?
A. Yes, sir.
Q. Are you familiar with the coupling apparatus on the tender of that engine?
A. Yes, sir.
Q. Have you used it as a brakeman?
A. Yes, sir.
Q. How would you open the knuckle of that coupling apparatus?
A. Pulling on the lever.
Q. Would that open the knuckle?
A. Why it usually opens right up.
Q. Would you have any difficulty in opening it up at times?
A. Why not as I remember of.
Q. Were you able to couple with cars with that apparatus?
A. Yes, sir.
Q. Before the accident to Solomon?
A. Yes, sir.
141 Q. How about afterwards?
A. I didn't notice any change in it.
Q. Has this coupling a side play in the collar?
A. Yes, sir.
Q. Do you know how much? Did you ever measure it?
A. I didn't measure it.
Q. Didn't measure it?
A. No, sir.
Q. What is the fact as to all couplers having a side play?
A. Why they all have a side play.
Q. And is that necessary in the operation of trains and in fact couplings?
A. Yes, sir.
Q. Would the position of the coupler as it sits in the collar be determined by the fact as to whether you uncouple from a car on a curve or on a straight track?

Plaintiff objected.
COURT. It seems to be self evident. Overruled.

A. I don't just understand.

Q. Well I will put it another way. You say there is a side play in the coupler?

A. Yes, sir.

Q. And sometimes the coupler is in one position and sometimes it is in another position?

A. Yes, sir.

Q. And sometimes it is in the center?

A. Yes, sir.

Q. My question is, is the position of it, is that determined by the lay of the track where you last uncoupled it?

A. Yes, sir.

Q. Whether it is curved or straight track?

A. Yes, sir.

Q. And if it becomes necessary to couple your engine onto a car is it necessary at times to adjust the coupler on your engine
142 so that it will couple with the car?

A. Yes, sir, it is.

Q. And is there a rule of the company as to when that should be done?

A. Yes, sir, they have such a rule.

Q. Have you a book of rules?

A. I have none with me.

Q. But were you furnished a book of rules by the company?

A. Yes, sir.

Q. As I understand it there are also bulletins posted up to, for the employees to read in reference to their duties in the way they perform their work from time to time?

A. Yes, sir.

Q. Showing you paper marked "Defendant's Ex. 2" I will ask you to read it, just to yourself, and tell the jury whether you read a bulletin of that kind posted in the Erie yard offices, have you seen such a notice before?

A. Yes, sir, I have.

Cross-examination.

By Mr. ANDERSON:

Q. When did you work with engine 75?

A. December, near the 1st of December, 1st, 2nd, and third I think.

Q. Of December, 1911?

A. Yes, sir.

Q. Had you worked with her any other time that you recall?

A. Why we had been using that class of engines and we would often change off but I can't recall just what dates. We often used that engine with the other class, the same.
143 Q. You have a number of engines of the same type?

A. Yes, sir.

Q. Have all of those engines the same type of coupler or are they different couplers?

A. They are some of them different and some of them just the same.

Q. And what type of coupler was this?

A. This was a Climax.

Q. It is necessary, as I understand it, to have some little side play isn't it, between the collar and the drawbar?

A. Yes, sir.

Q. How much side play, tell the jury?

A. Well I never measured the distance.

Q. But at any rate sometime in coupling the drawbar is left too far to one side, isn't it, so that it has to be adjusted or lined up?

A. Yes, sir, it has to be adjusted.

Q. Is there any way of adjusting or lining up the drawbar of this particular engine excepting by going in and doing it with the hand or the foot or some part of the body?

A. Well you are supposed to use a stick, I guess, but if you haven't got one you use your hand.

Q. A stick?

A. Yes, sir.

Q. Do you use the stick to kick over the drawbar?

A. Shove it over the same with the stick as your hand, whichever is handiest. If I have a brake club I stick the brake club against it or with my hand, either one.

Q. Did you ever use your foot?

A. Well I have done it already.

Q. Is there any way provided on the engine to do it, any lever or anything, to push the drawbar over?

A. Push the drawbar back and forth?

144 Q. Yes, to adjust it back and forth in position?

A. No, there is not.

Mr. CONROY: We will admit there is not.

Q. Were there any springs on the engine to keep it in position in the center?

COURT: On this drawbar.

Q. On this drawbar?

A. On the center.

Q. Yes?

A. No.

Q. Was there any springs to keep it in position?

A. No, I think not.

Q. There are on some cars are there not, springs to keep the drawbar in position in the center?

A. Yes, sir, some cars have springs in them.

Q. And the object of those is what, to keep the drawbar in position?

A. (No response.)

Q. I want to ask you whether or not sometimes your car inspectors sometimes put what is called "shims" in between there to tighten them up?

A. They don't work very good on an engine where they have them.

Q. Do they sometimes, I don't mean solid, but do they sometimes,——

A. Why I don't think they do.

Q. Have you never seen them?

A. Not in that kind of a coupler I never seen any.

Q. Have you seen them in some couplers?

A. They have springs in some of them.

Q. Describe to the jury how those springs operate and what they are like. What are the springs like? Are they a piece of
145 steel?

A. They are made from steel, yes, sir.

Q. What are they like? I don't,—explain it to the jury. Are they a coil spring?

A. Yes, sir, a coil spring.

Q. And they are put in there on some of the couplers to keep the drawbar in position?

A. Yes, sir, I suppose that is what they are for.

Q. I believe you told us there were none on this engine?

A. Well they are not a very good thing on an engine.

Q. If, have you ever had occasion on the particular coupler to have to go in and push her over, so as to line her up in order to make a coupling?

A. I don't recall no difficulty with that engine more than any other. I never remember of any trouble with her.

Q. I am not asking you whether you had trouble with her. I am asking you whether you ever had to go in and push that drawbar over with your hand or your foot on that engine?

A. Yes, sir, if it missed the coupler we would have to slack ahead and make it.

Q. What would make it miss a coupler, why did it do that?

A. Probably on a curve you would have to open the other knuckle,—one knuckle wouldn't do it.

Q. Did she ever miss on a straight track with you?

A. I never had any trouble with that engine on a straight track.

Q. You don't recall of any in the days that you worked?

A. No, sir.

Q. How about the cutting lever opening the knuckle, she always came open perfectly?

A. Yes, sir.

146 Q. Did you ever have to go in and open her with your hand?

A. No, not, only on curves where you would probably have to open both knuckles.

Q. Would it make any difference whether she was on a curve or straight track as to the opening of the knuckle by the cutting lever?

A. No, but sometimes you couldn't make it with one knuckle open on a curve.

Q. Weren't there cutting levers provided for opening both?

A. Well on the cars some of them wouldn't open without you used your hand to open.

Q. But this one, it would always come open with the first move of the hand?

A. I had no trouble with it.

Q. It would always come open, the knuckle, without having to go in there?

A. While I used it.

Q. And you used it in December, 1911?

A. Well I think the date was the first, second and third, I think it was.

Q. Well did you use the front end or the rear?

A. Well we used the rear end principally all the time.

Q. Did you charge your memory with this particular engine?

A. No, sir, I didn't charge my memory with that engine no more than any other.

Q. You work with a number of engines don't you?

A. Yes, sir.

Q. And you don't remember any more about this engine and how the coupler on the rear end worked than you remember how the coupler on the rear end of the other engine worked as to whether they would open or not, do you?

A. Well there was one engine we had, 88, that worked a little too free, the oil on the pin, it would fly open all right but the oil on the pin would allow it to close shut while you were going
147 along if the track was a little rough but I don't know any trouble like that with 75 or 54 or them that we had.

"That's all."

Defendant then recalled for further testimony in its behalf WILLIAM OWENS, who testified further as follows:

Direct examination.

By Mr. MANCHESTER:

Q. Mr. Owens, you were on the stand this morning, I believe?

A. Yes, sir.

Q. Have you since satisfied yourself as to when it was that you worked with engine 75?

A. Yes, sir.

Q. When was it?

A. August.

Q. 1911?

A. Yes, sir.

Q. Mr. Owens what work did you do with the engine?

A. Head brakeman.

Q. I will ask you whether you, as head brakeman, had occasion frequently to use the coupler on the tender end of the engine?

A. Yes, sir.

Q. Did you ever have any difficulty in operating it?

A. No, sir.

Q. In opening the knuckle how would you do it?
A. I would raise the lever and the knuckle would come open.
Q. Are you able to tell us how long you used that engine?
A. How long?
148 Q. Yes, how long you worked with it?
A. Three nights.
Q. All the time as head brakeman?
A. Yes, sir.

Cross-examination.

By Mr. ANDERSON:

Q. How many engines have you worked with, Mr. Owens?
A. Well on the extra list why we worked with different engines.
Q. About how many?
A. Well in thirty days we may have four or five different engines.
Q. And you worked with this engine three nights in August?
A. Yes, sir.
Q. And are you able to remember the condition of the rear coupler on this engine number 75 from working three nights, you are able to remember distinctly?
A. Why in the condition it was in at that time, yes, sir.
Q. How was the cutting lever? In what condition was that, describe it to us?
A. Why the cutting lever was in first class condition as far as I know.
Q. Assuming that the cutting lever would be sagged down and bent would you call that first class condition?
A. Well it wasn't sagged enough to interfere with the cutting.
Q. Was it sagged at all?
A. Not as I know of.
Q. Was the cutting lever bent otherwise than as it should be as far as you remember?
A. Not as I remember, no.
Q. What was the condition of the knuckle as you remember or do you remember?
A. I remember.
149 Q. Did you pay special attention to the knuckle on the tender?
A. The reason I remember because I never had no bother when I used it.
Q. By not having any bother you were able to couple cars?
A. Yes, sir.
Q. Did you during that time ever have to go between to adjust that coupler?
A. It all depends on what kind of track it was, straight track or curve.
Q. But did you ever?
A. Yes, I have.

Q. And what did you do? What did you have to go between to do?

A. Why it was on a curve, move the drawbar to the side, so both knuckles would reach.

Q. How would you move the drawhead to the side?

A. Sometimes give it a kick; sometimes I would pull it in if it was convenient to do so.

Q. Where did you do that, from the running board?

A. It all depends on where I was and seen I had chance enough to do it, I would.

Q. You would ride on the running board and do that while you were approach- other cars?

A. Yes, sir.

Q. Did you always wait till you were within ten feet of the other car?

A. Why it all depends on the distance I had. I didn't swing the engine down all the time but sometimes I did.

Q. Sometimes you swung it down and sometimes you didn't?

A. Yes, sir.

Q. And where you would start to approach a car, say two car lengths and a half, tell the jury whether you could tell whether it would meet the other coupler on the car and couple automatically or whether you would have to wait till you got up close?

150 A. I don't think you could tell.

Q. When would you first be able to tell how the coupler would be on the other car, whether or not you would have to adjust it?

A. Why the nearer it comes together you could use your own vision in regards to shoving it over.

Q. Was there any means provided on the tank or on the car to adjust or push this drawbar over in position excepting to go in between and do it with hand or foot?

A. You could pull it over with your hand?

Q. Was there any lever or anything of that kind?

A. No, sir.

Q. Were there any springs to keep it in position?

A. No, sir.

Q. During those three nights you had to do that a number of times?

A. Yes, sir.

Q. How about the knuckle; in opening the knuckle were you always able to open the knuckle by means of the cutting lever or did you sometimes have to go in and open it with your hand?

A. Always pulled the lever and the knuckle would come open.

Q. Do you remember whether or not you ever had to go in and use either hand?

A. No, sir, I don't.

Q. Would you say that you did not?

A. Yes, sir, I will say I did not, for the cutting lever is there to cut it with so it isn't necessary to go in and cut it by hand.

Q. I want to ask you as to these three nights that you worked

there whether or not you, it ever became necessary for you
151 to go in there and open the knuckle by hand?
A. No, sir, use the cutting lever.
Q. It always opened by the cutting lever?
A. Yes, sir.
Q. In one application,—did you have to spring it more than once or how?
A. Well every time you pull the lever the knuckle opened.
Q. Do you remember distinctly?
A. Yes, sir.
Q. Now do you also remember what you did on other engines?
A. Yes, sir, to certain extent.
Q. And what?
A. Yes, sir.
Q. Do you remember each night that you worked and each coupler that you worked and that you could use the cutting lever and it worked you remember that months back?
A. Yes, sir.
Q. As a matter of distinct recollection?
A. Yes, sir.
Q. Still working for the company?
A. Yes, sir.

Redirect examination.

By Mr. MANCHESTER:

Q. Mr. Owen, I neglected to ask you,—I will hand you this paper marked "Defendant's Exhibit No. 2" and ask you to read it to yourself?
A. Violation of rules. I have read this here over a year ago.
Q. What is the answer?
A. I have read it about a year ago.
Q. Where?
A. In the bulletin board in Mr. James' office.
152 Q. You are familiar with that rule?
A. Yes, sir.

Recross-examination.

By Mr. ANDERSON:

Q. You say you read that bulletin about a year ago?
A. Yes, sir.
Q. And that was posted with other bulletins wasn't it?
A. Yes, sir, on file there.
Q. Have you read it since?
A. No, sir.
Q. It has been hanging there all the time, I suppose, so far as you know?
A. So far as I know. I read only so far down on the bulletin,—till you come to one you have already read.
Q. You ordinarily just read those that are on top?

A. Yes, sir, well, read the bulletins on top until you come to one on file that you have already read.

Q. How many are on there?

A. Well sometimes there is as high as fifty on there, maybe more than that.

Q. One right on top of the other?

A. Yes, sir, put there stationary.

Q. You are required by the rule book to read those bulletins?

A. Yes, sir.

Q. That is the only way you were instructed, is by the book of rules, to read those bulletins?

A. Yes, sir, and they are put right there when you come in you can't help from noticing them, right at the top of the stairs.

Q. You were furnished with a book of rules?

A. Yes, sir.

Q. And a switch key?

A. Yes, sir.

153 Q. And a lantern?

A. Yes, sir.

Q. Do you remember any other bulletins that you read, Mr. Owen?

A. Why slow orders in tracks.

Q. Do you recall one that you read, any other one but the time that you read this one?

A. Well different slow orders and I forget just exactly what they are.

Q. What?

A. Different slow orders about going over frogs and toads and switches, when they put the toad in at Holmes Street they put the slow order.

Q. About this time?

A. Well along about that time, yes, sir.

Q. Don't remember what that said?

A. Nothing more than "Slow" on such and such a switch,—was out of order.

Q. That is a frog is out of place?

A. When you throw the switch you throw the frog.

Q. That was just a temporary condition?

A. Yes, sir.

Q. And you were notified not to use it?

A. Yes, sir, and when it goes into effect you are notified it is all-right.

Q. By another bulletin?

A. Yes, sir.

Q. So these bulletins that are placed are just for temporary notice to the employees?

A. Instructing the means and ways that your track is in.

"That's all."

Defendant then called as a witness to testify in its behalf
154 CARL SHOAFF, who being first duly sworn, testified as follows:

Direct examination.

By Mr. CONROY:

Q. What is your name?
A. Carl Shoaff.
Q. Where do you work?
A. Erie Railroad Co.
Q. In what capacity?
A. Yard conductor.
Q. How long have you worked for the Erie Railroad altogether? How many years?
A. About eight years and a half altogether.
Q. Previous to being a yard conductor were you a brakeman?
A. Yes, sir.
Q. How long have you been a yard conductor?
A. Possibly three years.
Q. Do you remember the occasion of Mr. Solomon being injured on engine 75?
A. Yes, sir.
Q. Previous to that accident had you ever worked with that engine?
A. Yes, sir.
Q. In what capacity?
A. Conductor.
Q. And did you ever work with that engine after the accident?
A. Yes, sir.
Q. Were you familiar with the coupling apparatus on the tender of that engine?
A. Not any more so than any other.
Q. Well were you?
A. Why as a coupler, yes, I knew.
155 Q. Did you ever do any coupling with it before the accident
A. Yes, sir.
Q. How about after the accident?
A. I did likewise.
Q. How did you open the knuckle on that coupler in what way?
A. By pulling the lever.
Q. Would that open the knuckle?
A. Sometimes.
Q. And sometimes *would it* not?
A. Sometimes it wouldn't, depending on how hard you pulled the lever.
Q. Well if you pulled the lever hard enough and properly would it open the knuckle always?
A. Well not always, no sir.
Q. Why not?

A. Well sometimes if you opened it it would fly back again.
Q. What would that be due to?
A. Well I couldn't say.
Q. If you jerked it too hard?
A. If you jerked it too strong or something like that.
Q. Will that happen with other couplers if you pull it too strong?
A. Yes, sir.
Q. I will ask you whether or not you were able to make couplings with cars with that coupling on that engine?
A. Yes, sir.
Q. And did you make couplings before the accident and atferwards?
A. Yes, sir.
Q. And have you observed couplings made by brakemen while you were in charge of that engine and crew?
A. Well I never paid any particular attention to that part of it. I have known them to couple on but I wasn't there to observe it.
156 Q. That is what I am asking you, if you know that such couplings were made?
A. I know that such couplings were made, yes, sir.
Q. Before the accident how long did you work with that engine?
A. One day.
Q. When was that?
A. First day of June.
Q. During that day was there any complaint made to you as conductor about this coupler failing to work or anything of that kind?
A. No, sir.
Q. And when did you work after the accident with this engine?
A. In August.
Q. How many days?
A. Well I don't know just exactly, between five and eight days now. I had it on two different occasions.
Q. Did you work as a conductor?
A. Yes, sir.
Q. And during that time was your attention called to any difficulty in operating that coupler?
A. No, sir.
Q. Or to any difficulty in coupling onto cars?
A. No, sir.
Q. Did you observe anything wrong with the handle or lever or the chain or the knuckle itself while you were working on that engine?
A. No, sir.
Q. Did this drawbar on that apparatus have a side play?
A. Yes, sir.
Q. Do you know how much?
A. No, sir.
Q. What is the fact as to couplers generally having a side play?

A. I don't know.
Q. I mean other couplers?
A. I don't know.
157 Q. Did you ever observe as to whether they had a side play or not?
A. Very near all of them have, some more than others.
Q. And it is necessary to have a side play in the operation of trains?
A. I think so.
Q. Does the position that the couplers must have in order to make a successful coupling depend on the trackage as to curved or straight track?
A. Yes, sir.
Q. Were you furnished with a book of rules?
A. Yes, sir.
Q. By the company?
A. Yes, sir.
Q. And are more or less familiar with those rules?
A. Well yes, a few of them.
Q. Showing you paper marked "Defendant's Exhibit 2" I will ask you if you ever saw a copy of that bulletin anywhere, in any of the offices, yard offices of the company?
A. Yes, sir, I have read it.
Q. Before the accident?
A. Yes, sir.
Q. Are new rules from time to time posted up on the bulletins in different offices of the company?
A. Not new rules.
Q. Well notices of this character?
A. Yes, sir.
Q. And what offices are they posted in?
A. Supposed to be posted in all the yard offices.
Q. And is there a bulletin board there for that purpose?
A. Yes, sir.
Q. Are you familiar with rule 266 referred to here in reference to going between cars to adjust couplers?
A. Yes, sir.
158 Q. And the ten foot rule?
A. That particular bulletin, yes, sir.

Cross-examination.

By Mr. ANDREWS:

Q. You are a yard conductor, Mr. Shoaff?
A. Yes, sir.
Q. For the Erie?
A. Yes, sir.
Q. And you worked with this engine number 75 on the first day of June?
A. Yes, sir.
Q. As brakeman or as conductor?
A. Conductor.

Q. Then on that day you did not do the coupling personally did you?
A. I have done it.
Q. I mean on the first day of June did you do it personally?
A. Yes, sir.
Q. Altogether?
A. No, sir.
Q. You had your rear brakeman do it, didn't you?
A. Not always, no, sir.
Q. Not always but generally?
A. Depended whether I was there or he was there?
Q. Well on that day did you?
A. I don't remember in particular.
Q. You don't remember particularly?
A. No, sir.
Q. Whether you did it or whether he did it?
A. I remember that day of coupling that engine.
Q. But do you remember whether you did the work mostly or whether he did it?
A. No, sir.
Q. You have no recollection of that?
A. No, sir.
Q. But you do say that you were able to make coupling with other cars?
A. Yes, sir.
159 Q. And you made couplings with other cars?
A. Yes, sir.
Q. Did you make couplings with other cars without having to go in between and adjust the knuckle or the drawbar with your hand?
A. I don't recollect.
Q. Will you say that you did not have to go between and use your hand or your foot or some part of your body?
A. I can't remember whether I did or not. Those things happen so often that you don't recollect all the moves that you make in a day.
Q. You are able to remember the cutting lever, aren't you, or are you, of that engine, can you recall it?
A. Well no, not exactly, not any different from any other coupling lever.
Q. Do you remember whether it was straight or sagged?
A. No, sir I can't remember.
Q. If the cutting lever was sagged it would lengthen the chain somewhat or give a little more play to it?
A. Well I couldn't say?
Q. Would it give more or less play to have it sagged down with a chain,——
A. It would give more bearing to this, (indicating in picture).
Q. So it would be more difficult to open the knuckle?
A. Not necessarily.
Q. But it would give more play to the chain wouldn't it?

A. Yes, sir.

Q. Do you recall the knuckle of that engine number 75, on the tank, do you recall how it worked? Did it work hard or easy or did you have to work hard on it or strong arm it?

A. Not any more so than any other.

160 Q. That is on your switch engines?

A. Switch engines.

Q. But do you recall what you did have to do? Did it come open easily?

A. Yes, sir.

Q. Clear open?

A. A. (No response.)

Q. Or did you have to use your hand?

A. I couldn't say.

Q. The fact is all of them you work with you have to go in and use your hand because they don't work?

A. Not always.

Q. But sometimes?

A. Sometimes.

Q. And you have to use your foot too?

A. Well it depends. Some people use their foot and some people use their hands.

Q. Where do you stand when you do that?

A. On the footboard of the engine, that is if you are coupling the engine onto the car.

Q. And while it is moving?

A. Yes, sir.

Q. And do you observe the ten foot rule?

A. No, sir, I don't.

Redirect examination.

By Mr. CONROY:

Q. The rules however require you to observe the ten foot rule?

A. Yes, sir.

Q. And when you violate it you take your own chances?

A. Yes, sir.

Q. When you talked about putting your hand on the drawbar or knuckle or your foot, that is for the purpose of adjusting

161 the side play and getting it in position?

A. Yes, sir.

Q. You don't put your foot in there to open the knuckle?

A. No, sir, I never did.

Recross-examination.

By Mr. ANDERSON:

Q. Is there any way provided by the company to adjust the side play of this drawbar from the side of the tank?

COURT: That is an admitted fact.

Mr. CONROY: We admit that there is no device to adjust the side play from outside the——

Mr. ANDERSON: Will you also admit that there is no device by means of,—adjusting it by means of springs?

Mr. CONROY: Yes, I admit that there were no springs on it.

Mr. ANDERSON: Or no other method excepting by the use of the hand or the foot?

Mr. CONROY: No, I won't put it that way. I will admit that there were no springs there or was no device to adjust it from outside the car.

Mr. ANDERSON: I don't accept that as broad enough so I will prefer to make my own case.

162 Q. Is it necessary to have some degree of side play in a drawbar,—it is I believe you said?

A. Yes, sir.

Q. Do you know how much side play this particular drawbar had?

A. No, sir.

Q. Are you able to couple onto another car if the drawbar of this engine should be pushed over to the extreme side, either side?

A. It depends.

Q. No a straight track, if the drawbar is pushed over to the extreme side, right side or left side, but the drawbar on the other car is properly lined, on center, are you then able to make a coupling?

A. No, sir, I shouldn't think so.

Redirect examination.

By Mr. CONROY:

Q. It would then be necessary to bring the drawbar on the tender into proper position to meet the drawbar of the car?

A. Yes, sir.

Q. And if the drawbar of the car was pushed over to one side and the drawbar of the tender was exactly in the center you still would have to make an adjustment?

A. Yes, sir.

Recross-examination.

By Mr. ANDERSON:

Q. What are springs provided for at the side of some drawbars that you have there?

A. Well I don't know.

Q. You know that there are springs on some of them at the sides or at the rear?

A. On engines?

163 Q. On cars we will say first?

A. Well I have seen them on some of them.

Q. Don't they all have springs at the rear of the drawbar?

A. At the rear of the drawbar they do, some of them. I don't say they all do but some of them.

Q. And isn't that for the purpose of keeping them properly lined, so as to meet drawbars on other engines or cars isn't that the purpose of those springs?

A. Not in the rear of the drawbar.

Q. Do you say to this jury that that isn't the purpose to them, one of the purposes?

A. In the rear of the drawbar.

Q. In the rear, I said.

A. Well you must understand here is the head of the drawbar and here is the rear of it. There is a spring in that drawbar.

Q. But doesn't that also serve to keep it in center?

A. Well not necessarily, not that I know.

Q. Isn't one of the purposes of that spring to keep it in center?

A. I don't know.

Redirect examination.

By Mr. CONROY:

Q. I suppose the spring in the rear of the drawbar is to aid in lessening of shock of bumping of cars?

A. Yes, sir.

Q. To save the bumper from damage?

A. Yes, sir.

Q. Did you ever have any experience with drawbars that had springs on the sides of it so as to keep it always in the center of the car?

A. Yes, sir.

164 Q. Have you experienced, I will ask you whether or not you have experienced any difficulty in coupling cars with that kind of an arrangement when the car is on a curve?

A. Yes, I have. You can't move them.

Q. What is the fact as to whether springs are in general use among the practical railroads or not, springs of that kind, are they common or are they otherwise?

A. Well I couldn't say, Mr. Conroy. Some rolling stock is equipped with them and some is not.

Q. How is it generally, are most cars without them or with them?

A. I never paid enough attention to that part of it?

Recross-examination.

By Mr. ANDERSON:

Q. It is a little more difficult to couple on a sharp curve when you have got springs at the sides?

A. Yes, sir.

Q. So that for,—so that you may be able to do it easily and quickly and speedily, the springs are taken away and takeu out, is that correct?

A. Those cars that those springs are built in, you can't get them out that easily.

Q. Have the cars as much play, side play, as this engine had?

A. Yes sir, I have seen them.
Q. How much have you seen?
A. I never measured them.
Q. How much side play did this one have?
A. I don't know.
165 Q. Well then how are you going to compare it?
A. Well that is what I say. I don't know. All you can do is guess at it.
Q. As a matter of fact you didn't examine this particular coupler so closely as to be able to remember now what the degree of this side play was there?
A. I didn't hear the first part of the question.
Q. As a matter of fact you didn't so carefully examine this particular coupler and drawbar on engine 75 as to be able to tell the jury what the degree of play there was?
A. No, sir.
Q. And you don't remember how much play there was today?
A. No, sir.
COURT: I understood you to say that one of the drawbars, that as a matter of fact you had experienced coupling two cars together on a curve where there had been springs on the side of the drawbar, did you ever have that experience?
A. Well I couldn't say two cars, your Honor.

Redirect examination.

By Mr. CONROY:

Q. Well how about with a spring on one, did you have difficulty then in making a coupling?

Plaintiff objected; sustained.

Q. Tell us about this experience on a curve where either one or the other of the couplers had springs on the sides?
A. Well I had no experience in particular excepting that you would have to move the car off of that curve.
166 Q. Why?
A. Well in the first place the springs were so strong that an ordinary man couldn't pull the drawhead over.
Q. Couldn't move it from its central position?
A. No, sir.
Q. And therefore you couldn't couple the car on a curve?
A. If your other drawhead was so that you could move it you could.
Q. And do you know of that fact from your personal experience?
A. I have had that experience. I can't recall when or the time.
Q. Do you know as a matter of fact that that is why couplers of that type are being discarded all over the country?
Plaintiff objected; sustained.

Q. If you had a coupler of that kind on an engine and you wanted to couple onto a car that was standing still and the coupler of that

car was moved over to one side as far as it could be, could you make a coupling without adjusting the coupler on the car standing still?

A. No, you couldn't.

Q. What is it?

A. Not if one was centered you couldn't.

"That's all."

Defendant then recalled as a witness to further testify in its behalf WILLIAM ROGERS, who having been previously sworn
167 testified as follows:

Direct examination.

By Mr. CONROY:

Q. Mr. Rogers, did you ever see a coupler that had springs on it to keep it in a central position in the collar?

A. Springs on it?

Q. Yes, springs to keep it in the center of the collar?

A. Why there is springs on some of them.

Q. And have you had any experience in making couplings with a coupler of that character?

A. Well they are all right on straight track but they are not much good on curves.

Q. Did you ever try to couple cars on a curve when there was a coupler of that kind?

A. Yes, sir.

Q. With what result?

A. I would have to pry them over and block them.

Q. How would you pry them over?

A. You would have to hunt, if you didn't have a brake club you would have to hunt a bar or piece of wood or something to pry them over.

Q. And was it necessary to do that before you could bring the knuckles together properly?

A. Well after you would try it two or three times you would come to the conclusion that it was all right.

168 Q. What I mean is after you put these blocks in and so forth, did you succeed in making the coupling?

A. Yes, sir.

Q. Could you have made the coupling without doing that on the curve?

A. No, sir.

Cross-examination.

By Mr. ANDERSON:

Q. And that would take time, Mr. Rogers, to do that?

A. Yes, sir.

Q. You might delay the traffic to do that?

A. Well it would delay it some.

Q. But it would in time?

A. Yes, sir.

Q. The springs are not always as tight as some of those you speak of are they; those were particularly rigid springs?

A. Some of them were tighter than others.

Q. And some of those real tight ones you would have to pry over and put your block in?

A. Well on a real bad curve you would in case you couldn't make it with both knuckles open.

Q. Occasionally you wouldn't have to pry them over at all even on a curve if they were rigid?

A. No, most curves you wouldn't.

Q. And when you have to make a coupling on a curve where you have rigid springs, you open both knuckles?

A. Yes, sir.

Q. And then she frequently makes that way with both knuckles open?

A. Yes, sir.

169 Redirect examination.

By Mr. CONROY:

Q. And sometimes it does not, isn't that true?

A. Yes, sir.

A. It becomes necessary to get blocks and iron bars to push the drawbar over to proper position?

A. On a few tracks it does.

"That's all."

Defendant then called as a witness to testify in its behalf JOHN HOLLIDAY who being first duly sworn, testified as follows:

Direct examination.

By Mr. CONROY:

Q. Where are you employed?

A. On the Erie Railroad.

Q. How long have you been employed there?

A. About a year and six or seven months.

Q. In what capacity?

A. In the yard.

Q. As brakeman?

A. Yes, sir.

Q. Do you remember the occasion of the accident to Mr. Solomon?

A. Yes, sir.

Q. Did you work with engine 75 at any time before the accident?

A. Yes, sir, I worked with engine 75 before the accident and since.

Q. And before the accident when was it that you worked with that engine?

A. Well I don't just mind the date but it was over at the
170 Ohio Works on that scale job.

Q. How many days did you put in with that engine working altogether before the accident?

A. Well I couldn't say, four or five days I should judge.

Q. And how many days after the accident did you work?

A. Well I have worked with her for the last two months down in the lower mill off and on with her.

Q. What position did you hold working with the engine, head brakeman, or,——

A. Yes, sir.

Q. Head brakeman?

A. Yes, sir.

Q. Now previous to the accident did you have any occasion to operate the knuckles of the tender of that engine?

A. Yes, sir.

Q. How did you open the knuckles?

A. I stood on the footboard and jerked the cutting lever and then took my hand and shoved the knuckle open if it didn't come clear open.

Q. How often did you use your hand to open the knuckle?

A. Oh maybe opened it maybe two or three hundred times a day.

Q. With your hand?

A. Yes, sir.

Q. How often would you open it with the lever?

A. Well I would have to open it with the lever and if it didn't come clear open I would have to take my hand to shove it open, if you gave it a quick jerk why it may come open itself.

Q. Well did you ever open it solely by the use of the lever?

A. Yes, sir.

171 Q. Was there any difficulty in opening it with the lever itself?

A. I never found a thing the matter with it.

Q. Did you observe any bent portion of the lever or any of it sagged?

A. No, sir.

Q. Did you observe anything wrong with the chain, it either being too short or too long?

A. No, sir.

Q. Were you able to couple onto cars with that engine?

A. Yes, sir.

Q. How often did you couple onto cars with the rear, with the coupler on the tender of the engine?

A. Well that was mostly our work, with the hind end of that engine.

Q. Do you have a book of rules of the company?

A. Yes, sir.

Q. Furnished you at the time of your employment?

A. Yes, sir.

Q. Showing you paper marked "Defendant's Exhibit 2" I will ask you to read that and state whether you ever saw a notice of that character posted anywhere on the premises of the company?

A. I never saw the notice, no, sir, but I have heard the boys talk about it. It was posted there in the office at Holmes Street.

Q. You knew of it but you didn't read it?

A. No, sir.
Q. You knew of rule 266?
A. Yes, sir.
Q. Did this coupler on the tender of engine 75 have some side play in the coupler?
A. Yes, sir.
Q. I don't suppose you ever measured it?
A. No, sir, I never measured it.
172 Q. And in coupling onto cars with that coupler was it at times necessary to adjust the coupler?
A. Yes, sir, mostly all the time.
Q. And you would do that by pushing the drawbars to one side or in the center or wherever it was necessary to do so to make a coupling?
A. Yes, sir.
Q. And in the operation of trains is it necessary to have that side play do you know?
A. I should think so. There is lots of times that you couldn't make a coupling if you didn't have that side play. Take it on a curve.
Q. Did you ever see any couplers that had springs on the sides?
A. Yes, sir, I have.
Q. Did you ever have any experience with any couplers of that kind in coupling onto cars on curves?
A. Yes, sir. It was pretty hard to do. I have had to take a block of wood and put in there and twist it around and then block it in to hold it over to make the coupling.

Cross-examination.

By Mr. ANDERSON:

Q. These springs that you talk about would keep the drawbar in center?
A. Yes, sir.
Q. And it would keep it so close to center that the only way, with hard and tight springs was that you would have to take a piece of wood sometimes?
A. Yes, sir.
Q. And that was when you were working on curves?
A. Yes, sir.
173 Q. That is not slight curves but hard curves?
A. Well there was lots of times that it wouldn't make on slight curves.
Q. And on those times with tight springs you would have to pry them over?
A. Yes, sir.
Q. And that would take time?
A. Yes, sir.
Q. And delay your engine?
A. Yes, sir.
Q. And delay your crew?

A. Yes, sir.
Q. Do you know how much side play it is necessary to have?
A. I don't know. I should judge though it was about two and one-half or two inches.
Q. Where, at the front end?
A. No, at the rear end of the tank. The coupler was on a strap.
Q. How many inches of side play is it necessary to have on the front end?
A. I don't know.
Q. Who has told you that two and one-half inches was sufficient, have you talked to anybody about it?
A. Nothing only to Mr. Manchester about it.
Q. And have you talked to Mr. Wheeler about it?
A. Yes, sir.
Q. That is the claim agent?
A. Yes, sir.
Q. And he thought two and one-half inches was about right?
A. Yes, sir.
Q. Have you talked it in the witness room with your other witnesses?
A. I have with a gentleman out there. I don't know what his name is, what did you say his name was, Mr. Wheeler?

"That's all."

Defendant then called as a witness to testify in its behalf
174 J. J. HERLIHY who being duly sworn, testified as follows:

Direct examination.

By Mr. MANCHESTER:

Q. Where do you live?
A. Newark, Ohio.
Q. What is your business?
A. Roundhouse foreman of the B. & O.
Q. How long have you been there, Mr. Herlihy?
A. I have been with them three months this last time.
Q. And before that time where were you employed?
A. I was general roundhouse foreman at Mosier roundhouse at Brier Hill.
Q. In the employ of the Erie railroad?
A. Yes, sir.
Q. How long were you there?
A. I was with the Erie at Youngstown about a year and a half I should judge.
Q. And before that time where were you employed?
A. I was with the Erie at Cleveland, erecting shop foreman, fitting shop foreman and roundhouse foreman.
Q. I will ask you if you recall an occasion when engine 75 was sent to the Cleveland shops for general overhauling?
A. I think 75 went to Cleveland shops some time in February and came back in March.

Q. Do you know about what day?
A. Along about the middle of March when she came back.
Q. What year?
A. Last year.
Q. 1911?
A. 1911 I mean.
175 Q. And are you familiar in a general way with the work that was done on her there?
A. Yes, sir, she received classified repairs that should take in all the work on the engine, and all the work on the tank. The engine was sent there for the reason that she had a cracked boiler and they gave her a general overhauling while she was there.
Q. Do you recall the occasion of the accident to Mr. Solomon?
A. Yes, sir.
Q. Did you notice when engine 75 came back from Cleveland whether the coupler has been changed or not?
A. I wouldn't say that the coupler was changed. The coupler was in first class condition that was in there
Q. Do you recall the occasion of the accident to Mr .Solomon?
A. Yes, sir.
Q. I will ask you whether or not following that accident you made an inspection of this engine and the coupler?
A. Twice.
Q. When was the first time?
A. The day following the accident. I think it was the third of June, 1911.
Q. Was anyone else present?
A. Yes, sir, Mr. Welch at that inspection.
Q. Now just tell us what you did and what you found?
A. Well, I measured the engine all up, cutting levers, the height of the step, the height of the drawbars from the rails, the side play in the drawbar, the height of the grab handles and the handles on the side.
Q. Coming to the couplers in particular, as that is a matter of question here, did you examine it?
A. Yes, sir.
176 Q. What examination did you make of it?
A. I examined the knuckle and the lock, chains, cutting levers.
Q. What condition?
A. I found the knuckle and lock in good condition, the cutting lever was bent down a little bit in the center which interfered in no way with the working of the lever.
Q. Did you open the knuckle with the cutting lever?
A. I did.
Q. Experience any difficulty in it?
A. No, sir, nothing more than you would have with any coupler. You have got to jerk them open.
Q. Did you measure the side play?
A. Yes, sir.

Q. That is at the point where the drawbar passes through the collar or the hanger?

A. The yoke, yes, sir.

Q. How much was that?

A. 2½" in all, 1¼ on each side.

Q. 1¼ on the side, you mean by that when the drawbar is central?

A. Yes, sir.

Q. So that the total side play is two and one-half inches when it is shoved clear over to one side?

A. Yes, sir.

Q. What condition did you find in the chain, is it too short or too long, or how?

A. No, sir, medium length. It opened the coupler very readily. I could see nothing wrong with it.

Q. Did you examine the pin?

A. Yes, sir, the pin was alright.

Q. Now when was this next inspection made?

A. I am not positive whether that inspection was made on the 4th or 5th, but I was requested to make that inspection by
177 Mr. Gorman and I took those other men out and we inspected her and I am not positive whether it was the 4th or 5th of June.

Q. Who was present?

A. Mr. Hummerson, Mr. Welch, Mr. Peterson, Mr. Connors, Mr. Hudson.

Q. I will ask you what kind of an inspection was made of the coupler at that time?

A. We went through all the M. C. B. requirements to see that everything was standard.

Q. What are M. C. B. requirements?

A. M. C. B. requirements says that the coupler should stand above 31½ or below, I think that is 35½, to the center of the coupler, two and one-half inches side play at the yoke, cutting lever and brake handle should have two and one-half inches clearance.

Q. What do you mean by M. C. B.?

A. Master Car Builders rules on all cars in the United States. Master Car Builders is the head master mechanics and car builders from all of the roads in the country. They come together every year and make the rules governing the cars. Their rules are supposed to be laws. Whatever they make is supposed to govern all the cars throughout the country.

Q. And are your inspections made to those requirements?

A. Yes, sir.

Q. And your equipment made accordingly?

A. Yes, sir, we follow their rules.

Q. Are their rules published in book form, do you know?

A. Yes, sir.

Q. And what is the fact as to whether or not these rules are followed by railroads enerally?

Plaintiff objected; overruled; plaintiff excepted.

178 A. I can't quite get that.

Q. What is the fact as to whether these rules of the Master Car Builders Association, I believe that is what you call it?

A. Yes, sir.

Q. M. C. B. rules,—what is the fact as to whether or not those rules are followed by the railroads generally?

A. Well you will find in all locomotive shops, car shops in general, a book showing the rules of the M. C. B. and it also publishes all the railroads in the country that belong to that and I think that you would find every railroad in the country in that book outside of a few narrow gauge railroads that might still exist.

Q. And have they adopted a standard side play in the couplers?

A. Narrow gauge?

Q. No, I mean the M. C. B.?

A. Yes, sir.

Q. What is that?

A. Two and one-half inches.

Q. That is at the yoke?

A. Two and one-half inches at the yoke is what I understand.

Q. Is there any coupler made which you know of which will always make a coupling when an attempt is made?

A. No, I don't know of any of them that are guaranteed to make it. I am not working in that line of business, you know,—I hardly ever go out to switch cars. Of course we are supposed to know that the coupler is in good working order and to know the making of the coupler and to see that they are right before they are put out.

Q. Let me ask you what kind of a coupler there was on this tender engine, this engine 75?

A. Climax.

Q. Is that a standard coupler?

A. Yes, sir.

179 Q. Have you ever had any experience, Mr. Herlihy, with couplers where a spring was used at the side of the drawbar?

A. There is none on the locomotives.

Q. What is it?

A. We have no locomotives with them on.

Q. Where do you find them?

A. Why I have seen cars with them on but I haven't seen any locomotives to my knowledge.

Q. What is the fact as to whether that is ordinarily used?

A. Well where it is used, the spring on each side, as you say, I don't see how they could couple a car with it.

Q. Explain.

A. It stands to reason, two cars on a curve, you couldn't couple them. The coupler would go off from the center of the track as the car would start to hit the curve.

Cross-examination.

By Mr. ANDERSON:

Q. Mr. Herlihy, how did you happen to come here?
A. I was sent here.
Q. Subpœnaed?
A. Not exactly, they wired to me to come.
Q. That is your own company or the Erie Company?
A. I got it from the dispatcher at Newark, Ohio, that I was called to Youngstown right away.
Q. Dispatcher of the Baltimore and Ohio or Erie?
A. Baltimore and Ohio.
Q. So that your employer, the Baltimore and Ohio sent you up here in this case?
A. Yes, sir.
180 Q. And what is your present position?
A. I am foreman of the roundhouse at Newark, Ohio.
Q. You are familiar with engines?
A. Yes, sir.
Q. You are not familiar with switching cars as brakeman or conductor?
A. No, sir.
Q. And you are not a master car builder?
A. No, sir, but I have read their rules considerable and I have had charge of all the works on the tanks and the couplers on tanks on our engines.
Q. Tell me of the rule that provides that the side play of drawbars shall be two and one-half inches, side play?
A. I couldn't tell you.
Q. Will you please bring into court here the master car builders' rules?

Mr. CONROY: We have got them right here.

Q. You say those are the laws that govern?
A. Yes, sir, you will find that the Interstate Commerce laws are about the same as the M. C. B.
Q. You say the Interstate Commerce law provides there shall be two and one-half inches side play in drawbars?
A. I did not.
Q. What did you say?
A. I said the M. C. B. standard was about two and one-half inches and I said that the Interstate Commerce laws were about the same on equipment as the M. C. B. standard.
Q. What are the standards of the Interstate Commerce Commission as to side play on drawbars?
A. I do not know.
181 Q. What are they as to height of drawbars?
A. Why they stand,—the height of the drawbar is supposed to be as near 33 as possible.
Q. Don't you know as a matter of fact that the Interstate Commerce Commission don't fix any,—have not laid down any rule as to side play?

A. I do not know.
Q. You are not familiar with that are you?
A. Not with that law in particular, no.
Q. This engine went into your roundhouse for repairs did it?
A. Yes, sir.
Q. And you found that there were so many repairs necessary that you had to send her to Cleveland?
A. That was several months before the accident.
Q. And in Cleveland, you sent her from Youngstown to Cleveland?
A. Yes, sir.
Q. To the shops and there she underwent classified repairs?
A. Yes, sir.
Q. She wasn't a new engine then?
A. No, sir, rebuilt.
Q. And when she came back are you able to tell this jury whether or not one of those classified repairs was a new coupler?
A. I could not.
Q. Do you know whether anything was done to the cutting lever?
A. I do not.
Q. Do you know whether or not anything was done to the chains or the locks or repaired in any way?
A. I do not, them chains and locks,——
Q. What is the fact as to if the cutting lever should be sagged in the middle what effect if any it would have on the opening
182 of the knuckle?
A. Yes, it might open the knuckle quicker.
Mr. MANCHESTER: How's that?
A. It might open the knuckle quicker by being sagged down in the center.
Q. That is it would lengthen out the chain?
A. Not exactly.
Q. Well would it lengthen out the chain or wouldn't it?
A. It might shorten the chain up with the lever bent down in the center. With your long lever from one end to the other bent down in the center you would have more leverage there than you had before it was bent. You have got the leverage on your taper as it is bent down.
Q. But as far as the lengthening of your chain is concerned wouldn't it lengthen your chain as it is sagged in the center?
A. It would lengthen your chain.
Q. And wouldn't you have to take up your chain before it would open your knuckle?
A. Oh, not much.
Q. Well would you any?
A. Well in a case of that nature it might have lengthened it a half inch.
Q. Only a half inch?
A. About that, I suppose. I should judge.
Q. How much did the cutting lever on that engine sag?
A. The cutting lever on some of them engines,——
Q. On that engine?

A. Well let's see. I think that cutting lever stood down about two inches, but some of them cutting levers are welded on that way, a little lower, some of them you see welded above the center, some of them in line with the center, and some of them below the center.

183 Q. That is welded that way?

A. Yes, sir.

Q. Placed that way purposely?

A. Yes, sir.

Q. Purposely so that they would pull up the cutting lever quicker, better?

A. Yes, sir.

Q. They do better work by being bent down than if they were straight over?

A. Oh no, not exactly.

Q. Well then what is the object?

A. The object of that is that it might have got bent the least bit but the coupler was in A No. 1 shape. I tried it and seen it was working al- right. All the men that was with me said that the coupler was in good shape.

(Question read).

A. What is the object of having them welded that way?

Q. What is the object of having them sagged down?

A. Well you didn't understand my answer.

Q. Well I would rather you would understand my question.

A. The arm of the cutting lever is welded on there before it is put on the engine and what I mean to say, what I mean to tell the jury is that if you will find there is a hanger on both sides of that cutting lever and if the cutting lever should be bent down in the center you would have a swing there with your arm on that as you lift it, following down the taper, it would lift your chain faster than it would if the weld was straight.

Q. So your engines on the Erie you build them with a sag in the center?

A. Not exactly, no sir. Some of them get sagged. It doesn't injure the working of the coupler at all.

184 Q. And that there would be sagged wouldn't lengthen out your chain?

A. Not exactly.

Q. Wouldn't lengthen your chain?

A. No, sir.

Q. I will ask you whether if this cutting lever were straight over, straight across, whether or not that wouldn't take up some of that chain there, whether or not the chain isn't looser from the shape it is in there?

A. Might by straightening that rod out, it might raise the rod in the center three-quarters of an inch. I don't think it would raise it a bit more than that. Furthermore I can't see anything the matter with that cutting lever at all.

Q. Can't see anything the matter with the coupler or couldn't with that one up there?

A. No, sir.
Q. It was a perfectly good coupler?
A. Yes, sir.
Q. It would couple with other cars?
A. It would, yes, sir.
Q. Men didn't have to go in and adjust it by means of their hands?
A. Well now I won't say that, no sir. It stands to reason as I spoke before, on cars on curves.
COURT: No, outside of the side play, in your judgment would it be necessary for men to open it up at all by hand?
A. Oh no, it wasn't necessary to open the knuckle.
Q. So that from your examination of this coupler you would say to the jury that it wasn't necessary for men to go in and open up the knuckle by means of their hands?
A. No, now you may take these knuckles, you can pull up on that cutting lever and the knuckle will just work open, and if you take the cutting lever and jerk it up, which is proper, it will
185 throw the knuckle open, which is the way they are supposed to be run.
Q. But from your examination, when you were there and these other men there to examine, you say to this jury that from those examinations it would never become necessary for men to go in there to open that knuckle, but you could do it right along by means of the cutting lever?
A. I done it right along by means of the cutting lever.
Q. What does the Master Car Builders Association provide with reference to shims or packing or something like that between the drawbar and the collar?
A. Do they?
Q. Yes.
A. Not that I know of.
Q. Do the car inspectors, car repairers?
A. Not that I know of.
Q. Never saw that done?
A. I have seen shims put under the coupler to raise it to the proper height.
Q. Have you ever seen it on the sides?
A. Not to my knowledge.
Q. Have you on engines or cars?
A. I have seen springs on cars.
Q. What would be the object of the springs?
A. I don't know. I should think they would be more of a detriment than without the springs.
Q. It would take long to operate?
A. I don't see how they can operate them at all on a curve.
Q. What is the play in cars between the collar, the standard play of cars?
A. I don't know. I never worked on cars.
186 Q. Is the standard side play two and one-half inches on cars?

A. It would practically be the same by the M. C. B. rules.
Q. Do you know?
A. Not positive.
Q. What is the M. C. B. rule on that proposition as to cars?
A. I never studied over the M. C. B. rule on cars. I mean on cars in general outside of what was pertaining to my work and that would be two and one-half inches.
Q. As to cars?
A. Yes, sir.
Q. Or is that tanks?
A. Cars and tanks, that would be all couplers.
Q. All couplers are two and one-half inches?
A. Yes, sir, that didn't have the springs in them.
Q. Now I wish you would get that M. C. B. rule.
A. I don't know whether I could find it or not.

Mr. MANCHESTER: It is right here, Mr. Herlihy.

A. "Side clearance of couplers," "that the total side clearance of couplers be two and one-half inches."
Q. What does side clearance mean?
A. That would be the side clearance at the yoke.
Q. Where do you find that it is side clearance at the yoke?
A. Well that would be mechanically speaking the side clearance at the yoke if I was to read that and put a coupler up, that is what I would want.
Q. That would be your interpretation?
A. Yes, sir.
187 Q. Can you show me something in here that shows that that is at the collar or at the yoke as you call it?
A. I don't know whether I could or not.
Q. Will you say to this jury that it isn't at the front?
A. No, sir, I will not, because I have always been instructed to build them that way.
COURT: Is there anything standard about these different makes of couplers as to the width of the jaw, what I would call the jaw, they are in the shape of my hand, practically speaking?
A. Yes, sir.
COURT: What do you call that recess, that concave, what do you call that?
A. Well I wouldn't know exactly what you call it.
COURT: Well let me call it the recess, what is the width of that recess?
A. Well we have standard gauges for them.
COURT: Well what is the standard width when it is open?
A. Well I won't say that I ever measured,—oh, when it is open?
COURT: Yes, when the knuckle is standing open?
A. Oh we never had any gauges for that. It was when the knuckle was closed.
COURT: So you wouldn't know the width of the Climax coupler when the knuckle is standing open?
A. No, sir.

Mr. ANDERSON: When was this adopted, this one here?
188 A. I don't know when that book was issued.
Q. Well I would like to know when that was adopted, it says 1910 here.
A. 1910.
Q. Is that when this was adopted?
A. Yes, they get them out every year.
Q. What is the standard of play at the front end of the drawbars?
A. Well I don't think there is any particular standard there, whatever the difference is from the tail end of your car,—you have two and one-half inches at your yoke, whatever the difference in length would be I should think that would throw it about, I suppose that would throw the front end of it four and one-half inches back.
Q. Now in this particular engine is the drawbar fastened on the same as in cars?
A. Not exactly. There is all different kinds of ways for the drawbars to be fastened on.
Q. Is this one as long as the drawbars in cars or not?
A. Practically the same thing.
Q. How long is it?
A. It stands about twelve inches, I think.
Q. How far is it underneath?
A. How far does it extend underneath?
Q. Yes, sir.
A. Oh about forty inches, I think.
Q. What other repairs did this engine undergo?
A. At the Cleveland shops?
Q. Yes.
A. I could not say. She went up there for,—we had the engine at Brier Hill doing the work on her and in putting the state
189 test on her we cracked the boilers so we considered it pretty expensive, the engine was about due for repairs, to do that at Brier Hill so we sent her to Cleveland and when there they gave her new tires and I suppose they spotted the valve, bored out the cylinder, turned the pistons and valve stems.
Q. But you will not say they put on a new coupler or drawbar?
A. No, sir.
Q. Will you say they put on new hangers?
A. No sir.
Q. Or new collars or anything of that kind?
A. No, sir.
Q. Will you say that they did anything with the coupler?
A. No, sir, they inspected it, I suppose.
Q. That is a supposition with you?
A. You have got me there. They are supposed to do nothing there but inspect them. If them engines go out and anything is found wrong with them and the Interstate Commerce man catches them the company is fined $100.
Q. You have the same thing in the yard?
A. Yes, sir.
Q. Does the Interstate Commerce man come down there also?
A. Yes, sir.

Q. Come there frequently too?
A. Yes, sir.
Q. Never find anything out of order, do they?

Defendant objected; sustained.

190 Redirect examination.

By Mr. MANCHESTER:

Q. Mr. Herlihy, do you know how long the standard clearance has been fixed at two and one-half inches?
A. No, I couldn't say exactly.
Q. Do you know how long has it been that way to your recollection?
A. To my recollection I have been following up, well I started to follow up locomotive work in 1910. I didn't have much to do with couplers till along about 1907. From 1907 on that is about the only way I ever knew of it being built on locomotives outside of some locomotives that is on the B. & O. They have a coupler on the B. & O. on their yard engines on which you can swing around the point from ten to twelve on the standard coupler.
Q. What is the side clearance there? Is that side play made possible by the way the coupler is hung underneath?
A. There is practically no side play at all on it. It works in a socket on the back with a pin down through it. You can throw the couplers back and forward to any position at all to make any curve. I suppose you can work them couplers from ten to twelve inches.
Q. That is at the end of the knuckle?
A. Yes, sir.
Q. When did you say you started to follow engine work?
A. April 22, 1902.
Q. Oh, I thought you said 1910, now,—I think that's all.

191 Recross examination:

By Mr. ANDERSON:

Q. With a coupler that will swing two and one-half inches, if that kind of a coupler is on this engine, if that be pushed over to the extreme right side or extreme left side, will it couple with other cars automatically without men having to go in and adjust them by hand?
A. Well sometimes them couplers you have got to hit them easy, sometimes you have got to hit them real hard,—it all depends on how the latch when you jerk it up sets in there, but generally speaking when the couplers are in line with each other, when they come in contact they will drop and latch.
Q. I will agree with you when they are in line they will couple automatically upon impact, but assuming that one of the couplers is pushed over to the extreme right, then will it couple without adjustment?
A. It would not on a straight track.
Q. It would not on a straight track?

A. No, sir, but it would if it was on a curve that suited that.

Q. But on a straight track you would have to go in and adjust that before it would couple onto another car?

A. I suppose you would if it was pulled over to one side.

Q. What is the side play on the front end here?

A. I said I thought that was about four and one-half inches.

Q. And with four and one-half inches of side play here at the front end, in coupling to another car on the straight track if this coupler were pushed over to the extreme right you think it would not couple to another car without having to be adjusted back
192 into position?

A. I hardly think so. It might if both knuckles were open, on the car and the engine.

Q. But the chances are that it would have to be lined up or put in position?

A. I rather think it would couple with both knuckles open. I have never done any switching. I don't know very much about that, out on the track.

Q. And is there any device here in the center to bring that drawbar back into position?

A. No, sir.

Q. What is the only means you have of bringing it back into position?

A. Well if you hooked onto the car and pulled it out onto the straight track it would be straight.

Q. Any other way?

A. No, I don't know of any other. Of course you can push it around in position.

Q. By hand or foot?

A. Yes, sir.

Q. And that is the way you sometimes do it up there?

A. We never do anything like that up there.

Q. You never push it over with hand or foot or body?

A. Not unless we are trying it, in at the shop,—I am the roundhouse foreman.

Q. So you don't do it in the roundhouse?

A. Very seldom. We might couple one engine onto the other to move the engine.

Q. But as to your operation, as to the work, do they do that?

A. As to what?

Q. Operation in the yards?

A. I do not know.

Q. You never observed?

A. No, sir.

Q. You never saw them line up the drawbar by kicking it over with the foot?

A. No, sir.

193 Q. Or pushing it over with the hand?

A. No, sir, I don't recall of ever standing watching them switching.

"That's all."

Defendant then recalled as a witness to testify in its behalf JOHN MULVEY, who being first duly sworn, testified as follows:

Direct examination.

By Mr. MANCHESTER:

Q. I believe you were on the stand this morning.
A. Yes, sir.
Q. Do you recall when engine 75 was brought back from Cleveland after having undergone repairs in the Cleveland shops, I don't mean the date, but if you recall that fact?
A. No, I don't remember the date.
Q. Do you recall the fact?
A. Yes, sir.
Q. I will ask you whether or not after she came back from there you operated that engine?
A. I had charge of the engine, yes sir.
Q. I will ask you whether or not you noticed what kind of a coupler there was on the engine when it came back from the shop?
A. Why she had a different coupler from the time she left,—that is from the time I had her before.
Q. What kind of a coupler did it have when you had it before?
A. To the best of my knowledge it was a Gould coupler.
194 Q. And when she came back from the Cleveland shop,——
A. A Climax.
Q. Was that the same coupler that was on when this accident occurred?
A. No, sir, it was a new coupler.
Q. I say was the Climax coupler the same coupler that was on when Mr. Solomon was hurt?
A. Yes, sir.
Q. What was the name of the other coupler?
A. I am pretty sure it was a Gould.

Cross-examination.

By Mr. ANDERSON:

Q. When did you have the engine before she went to the shop?
A. Well now, Mr. Anderson, I don't know just exactly the date. I don't pay much attention to that but I had her some time before she went to the shops, worked with the engine.
Q. Do you keep any record as to couplers, etc.?
A. No, sir, that is entirely out of my line of business.
Q. But your recollection is she had a Gould on at that time?
A. Yes, sir, that is before she went to the shop.
Q. And then you think she had a Climax when she came back?
A. I know she had.
Q. And do you know that that coupler was a brand new coupler?
A. I feel satisfied from all appearance it was.
Q. And then how often do you change couplers?
A. Well whenever they are damaged or unsafe I suppose they change them. We have nothing to do with that.

195 Q. But do they change them frequently in the shops?
A. Whenever it is required, whenever they become unfit for service.
Q. And they do that at the roundhouse?
A. Yes, sir, they do that there, that kind of work.

"That's all."

Defendant then called as a witness to testify in its behalf WILLIAM WELSH, who being first duly sworn, testified as follows:

Direct examination.

By Mr. MANCHESTER:

Q. Mr. Welsh, you live in this city?
A. Not now.
Q. Where do you live?
A. Chicago.
Q. What is your business, Mr. Welsh?
A. Why I was an engineer up until here lately. I am now out at Chicago starting an air test engine.
Q. Are you in the employ of the Erie Company now?
A. Yes, sir.
Q. I will ask you whether or not you were in the employ of the Erie about June 1st or 2nd, about the time Mr. Solomon was injured?
A. I was engine inspector at Brier Hill at that time.
Q. As engine inspector what were your duties?
A. Inspecting the engine all over and reporting all defects and have it fixed.
Q. Just explain to the jury the nature of the inspection you would make and when you would make it and how fre-
196 quently?
A. The engine was supposed to be inspected as soon as it comes in the roundhouse and look her all over carefully and find out all defects and have them fixed and as a general rule if I was there when the engine came out I would inspect her again to see if the engine was al- right.
Q. In the course of your inspection I will ask you if you had charge of inspecting engine 75?
A. Yes, sir, every morning.
Q. Every morning?
A. Yes, sir.
Q. And for how long did you do that?
A. Well I guess I had her there about three or four months, about three months, I guess.
Q. Was that your duty under the rules of the company?
A. Yes, sir.
Q. Was that the purpose for which you were employed?
A. Yes, sir.
Q. I will ask you, Mr. Welsh, if you recall the occasion of the injury to Mr. Solomon?

A. Yes, sir, I recollect of it.

Q. Did you make any inspection of the engine following that injury?

A. Mr. Herlihy and I did the next morning.

Q. Now describe to the jury the inspection you made and what you found?

A. That we made?

Q. Yes?

A. First thing I done was to take the height of the drawhead to see if it was the standard height and then I took the side measurements to see that there wasn't too much loose motion there. It measured about two and one-half inches when it was shoved
197 over to one side but if the drawhead would be in the middle it would be about one and one-quarter inches from each side. Then I also measured the step to see if they were the standard from the rail, and they were, twelve inches, and the chain and rods and everything seemed to be in perfect working order, the lock.

Q. You examined the cutting lever and chain and pin?

A. Yes, sir.

Q. What condition did you find?

A. Found them in good order?

Q. Were you present when another inspection was made after that time?

A. Yes, sir, the next, following day.

Q. And I will ask you what the nature of that inspection was?

A. Well we went through the same thing again. We had more men there.

Q. Others were present?

A. Yes, we had about five or six men there I guess.

Q. And that was made at the request of,——

A. General foreman.

Q. What condition did you find the coupler in then?

A. Everything in working order, properly.

Q. Do you recall the occasion of the last inspection you made of the engine before this accident?

A. Of the last one?

Q. Yes?

A. That morning before she went out.

Q. What condition was the coupler in then?

A. Al- right.

Q. You say you inspected it every morning?

A. Every morning as soon as they would back her on the
198 turntable I used to take advantage of the drawhead on the turntable rails because that was the best place. When you get her out in the yard you are liable to get low joint or a high joint which would change it. I used to measure them on the table.

Q. Mr. Welsh, is the Climax standard coupler a standard coupler?

A. I guess it is.

Q. Is that the kind of a coupler this was?

A. Yes, sir.

Q. Did you ever have any experience with springs, where they were used at the sides of the drawbars?
A. Yes, sir.
Q. Explain about that.
A. Well we have had them on some of our freight engines. They would be pretty hard to work sometimes on a curve.
Q. Why is that?
A. They are al- right on straight track.
Q. Why is it they are hard to work on a curve?
A. Because the springs are pretty stubborn. They are hard to pull over if you have to make a coupling.
Q. And when you made these different inspections and tests that you speak of, how did you open the knuckle?
A. With the lever.
Q. Operate the lever in the ordinary way?
A. Yes, sir.
Q. Find any difficulty in operating them?
A. No, sir.
Q. Did the knuckle open properly?
A. Yes, sir.
Q. Does it make any difference, Mr. Welsh, when you attempt to open the knuckle as to whether you attempt to give it a
199 light pull or a stiff jerk?
A. Yes, sir.
Q. About how much does one of those knuckles weigh, would you be able to tell us?
A. I wouldn't know just exactly. I would judge around ten or twelve pounds anyway.
Q. How much does the whole drawbar and coupler weigh?
A. I wouldn't know the weight of that.
Q. Would you have any idea as to whether one man could lift it?
A. No, one man couldn't lift it very handy.
Q. How many men would it take to carry it comfortably?
A. Well about two men used to carry them comfortably, that is the drawhead you mean?
Q. Yes.
A. Yes.
Q. When you wanted to open the knuckle of one of these couplers what kind of a jerk would you have to give it?
A. A sudden jerk.

Cross-examination.

By Mr. ANDERSON:

Q. You were the inspector at the roundhouse?
A. Yes, sir.
Q. In charge of the inspection of engines?
A. Yes, sir.
Q. And you were responsible for the proper working as far as inspections go, were you not?
A. I was responsible for the reporting of it, yes, sir.

Q. And how much of the engine did you have to inspect?
A. Every bit of it.
200 Q. How long a time did you have to do that?
A. As much as I needed.
Q. How much did you need?
A. Depended on how much work there was to do.
Q. On the day of the accident?
A. On the day of the accident?
Q. Yes, you inspected it every morning, you said?
A. Yes, sir.
Q. How much time did you take?
A. Oh I don't know. I guess it would take you about five minutes.
Q. To inspect that whole engine?
A. No, sir, didn't inspect the whole engine, not going out in the morning. The whole engine was inspected going in at night and then I inspected the engine's drawhead's always going out in the morning.
Q. About how long did that take you?
A. About five minutes.
Q. For both bars?
A. Just the drawbars and front and back steps and see that they were in good working order.
Q. Did you inspect the both bars the night before?
A. No, sir, I wasn't there then.
Q. You left that to someone else?
A. Yes, sir.
Q. But you do remember of this particular morning of inspecting that drawbar?
A. Yes, sir.
Q. You remember it distinctly?
A. Yes, sir, every morning.
Q. Have you any record showing that?
A. Yes, sir.
201 Q. Will you produce it?
A. No, I haven't got it here.
Q. What inspection did you make?
A. What inspection?
Q. Yes.
A. The drawbar inspection and,——
Q. Tell us what you did.
A. We have a standard gauge there. We first put the gauge on the top of the rail and we gauge the middle of the drawbar to see whether it is standard.
Q. To see whether it is too high or too low?
A. Yes, sir.
Q. Then what?
A. We look at the steps and try the cutting lever and see that everything is in working order and that is all.
Q. You tried the cutting lever that morning?
A. Yes, sir.

Q. And it was perfectly al- right?
A. Yes, sir.
Q. And the first time you lifted it that morning she came open?
A. Yes, sir.
Q. No trouble whatever?
A. No, sir.
Q. And you remember that distinctly now?
A. Yes, sir.
Q. How much weight is there to pull up there by means of that cutting lever?
A. I couldn't answer.
Q. About how much?
A. There don't seem to be any weight when you give it a sudden jork.
Q. How much does that lever weigh?
A. Oh the way it is hanging there,—they wouldn't weigh very much.
202 Q. What do you pull up on the part of the coupler?
A. The lock.
Q. The lock is situated on the inside.
A. Yes, sir.
Q. In a pocket?
A. Yes, sir.
Q. How much does that weigh?
A. It would probably weigh a pound and a half or two pounds.
Q. So that the amount of strength that you have to exert is against that?
A. Yes, sir.
Q. And you have more leverage out there at the end than you have in there so that it ought not to weigh a pound and a half?
A. Well that assists in lifting it.
Q. So if you pull to the extent of a pound and a half, if that were in good working order she would respond?
A. Yes, sir.
Q. But if she were battered,—if that lock in there were battered by use, then it might be very difficult to pull up?
A. Oh yes, if it were battered by use it would be hard to pull up.
Q. Is there any other reason why it might be hard to pull up than being battered by use?
A. I don't know of any.
Q. That is the only thing that could,—did you take her apart after this accident?
A. Take the drawhead apart?
Q. Yes, sir?
A. No, sir.
Q. Did you make an inner inspection of it?
A. Yes, sir, we opened the knuckle and looked at it.
Q. What did you find?
A. Found nothing, everything al- right.
203 Q. No wear?
A. Not to speak of.

Q. Any rust?
A. No, sir.
Q. Any battered condition there?
A. No, sir.
Q. No part of that coupler or drawhead was in anyway battered?
A. Not that I know of.
Q. There were no nicks or marks anywhere?
A. Oh there might be a scratch somewhere.
Q. But outside of a scratch there wasn't anything battered anywhere?
A. Not that I know of.
Q. If there had been you would have know it?
A. Well I guess I would.
Q. What was the condition of the cutting lever?
A. It was al- right. Had a little bit of a bend in it. Not to interfere with it in any way.
Q. Have you talked to anybody about this case?
A. No, sir.
Q. Nobody at all?
A. No, sir.
Q. To the claim agent?
A. I just got here last night from Chicago.
Q. Have you talked to anybody about it?
A. No, sir.
Q. Today?
A. No, sir.
Q. Nobody at all, talk to anybody in the back room there with the witnesses?
A. No, sir.
Q. Hear any of them?
A. No, sir, I don't need to have anybody talk about it. I have been around long enough to know those things myself.
Q. Have you heard anybody say that that was sagged, the rod?
A. That was my duty to see those things.
204 Q. I am asking you if you talked to anybody?
A. No, sir.
Q. Not anyone?
A. No, sir.
Q. Have you a book in which you record?
A. I did have one but I don't know where it is.
Q. You are now in Chicago working for the Erie?
A. Yes, sir.
Q. After the accident you had some more tests, you made some more tests of this drawbar?
A. Yes, sir.
Q. She worked just as well then as before?
A. Yes, sir.
Q. But whether anything had been done to that drawbar between the time Mr. Solomon got hurt and between the time you examined her you do not know do you?
A. No, sir, I don't.

Q. Oh, you say there were springs on some of your freight engine-?

A. Yes, sir.

Q. Describe that condition to the jury and what was the object of the springs?

A. Oh, I don't know any more than it might be a different style of drawhead than any of the rest and they would have a longer carrying iron on them, big space in the back end and in order to fill up that space they put springs in there to keep it in the center. But this engine it had no large springs in there and they couldn't use springs on it. The springs are only to fill up that space if the drawbar is too wide in the beam.

Q. But the object of the springs was to keep it in the center?

A. That is on these big cut pockets.

Q. Yes, keep it in the center?

A. Yes, sir.

205 Q. Was it your duty to place shims under the drawbar if it was too low?

A. No, sir. My duty was to report them raised up.

Q. Was there anything of that kind under this drawbar?

A. No, sir.

Q. None at all, she was just leaning right on the collar?

A. On the carrying iron.

Q. So there was nothing between the carrying iron and the drawbar?

A. No, sir.

Q. I will ask you to look at that picture and state whether there is anything in there on that picture between the drawbar and the carrying iron?

A. Oh, I recollect of that, yes, sir, there was a cleat in there.

Redirect examination.

By Mr. MANCHESTER:

Q. What do you say it is that is under the drawbar, Mr. Welsh?

A. Cleat, I guess they call it.

Q. Are there any shims at the side or at either side of the drawbar?

A. That is all just underneath.

Q. Mr. Welsh, I will hand you this paper marked "Defendant's Exhibit 3" which contains three separate cuts of the Climax couplers and ask you if those are correct representations of Climax couplers showing the method and manner in which they are made?

A. Yes, sir, they are.

Q. Now what are the different parts, Mr. Welsh, and just explain to the jury how it is that the coupler operates and what it is opens the knuckle?

A. What it is opens the knuckle?

206 Q. Yes, and where it is shown?

A. Well there is a rod goes onto the end of the tank and it has a short rod that runs from the long rod out to this hook here

on the end of the knuckle, and then there is a chain runs from that out to this little short rod that comes up and by lifting up on this lever on the outside of the tank it raises this lock far enough by that jaw to allow this to pass out and then when the thing is locked that will stand up there or it may fall down and when you force your knuckle shut again it throws that out enough to force itself by and then automatically locks itself.

Q. What part of the coupler is it you call the pin, whereabouts is it located?

A. The pin?

Q. Yes?

A. Right here.

Q. What do you call this little jaw shaped affair that hangs back of the knuckle?

A. That is the lock.

Q. When did you come, Mr. Welsh?

A. When did I come?

Q. Yes?

A. Here, you mean?

Q. Yes?

A. Well I went through on the train to Sharon last night. I got in these about one o'clock. I got over here about nine o'clock this morning from Sharon.

Recross-examination.

By Mr. ANDERSON:

Q. Did you ever report this drawbar or coupler during the time you worked there as defective in any way?

A. No, sir.

Q. You always reported her all right?

A. (No response.)

207 Q. How long did you say you had charge of her?

A. I guess that engine was there about three months.

Q. Before or after the accident?

A. Well I think she came there in March.

Q. And you had charge about three months?

A. Well wait till I see, I left there in September.

Q. Left in September?

A. Yes, sir.

Q. And you had charge of her all the time from March till September?

A. Yes, sir.

Q. And you never reported her in any way out of order during that time?

A. No, sir.

Q. And you recall every time that you examined her?

A. Well I couldn't go over that because I had hundreds of engines there to recall, but I know that engine there was a new engine, you might say now, right out of the shop and in good order.

Q. You say you had hundreds of engines to recall?

A. Yes, I had to look over them all.

Q. And you tell us though that you remember on this particular morning having examined the drawbar on the tank of this particular engine?

A. Yes, sir.

Q. And you recall that from recollection?

A. Yes, sir, because I know that the next morning I had her examined over again carefully and the next day also, three examinations in succession.

Q. Can you tell me any other morning you can recall having examined her?

A. I told you she was examined every morning she went out of the house.

208 Q. And you say that from memory?

A. That engine went down with two passenger engines every morning.

Q. Do you recall examining her every morning?

A. Yes, sir.

Q. Can you recall any particular day except these three days you have mentioned that you examined her?

A. Oh well some days I wouldn't be there.

Q. But every time you did examine her you remember it?

A. Oh, no.

Q. But you do remember examining her on this day, on the day of the accident?

A. Yes, sir.

Q. From distinct recollection?

A. Yes, sir.

Q. Can you tell me any other engine that you examined on the day of the accident, on the morning of the accident, from recollection now?

A. I had no reason to commit any other engine to memory as well as I had that one.

Q. What reason did you have?

A. Because there was a man hurt on that engine.

Q. What reason did you have for committing that to memory in the morning, no accident happened until after dinner did it, 2:30?

A. Well I know but I told you it was my duty to see that everything was in working order before they left. If they wasn't I would have it repaired and they wouldn't go out till it is done.

Q. So that is how you know it was done because it was your duty to examine it and report it?

A. Yes, sir.

Q. And not from recollection?

A. It was my duty to report it; if it wasn't fixed it wouldn't have gone out.

Q. Because that was your duty?

A. Yes, sir.

209 Q. But do you remember as a real matter of fact of having gone to it that morning and examining it?

A. Yes, sir.
Q. From your recollection?
A. No, sir, from my duty.
Q. What?
A. Duty compelled me to do it.
Q. Tell me of one other engine that your duty compelled you to examine that morning, that you did examine that morning?
A. I examined two passenger engines with that engine, 2524 and 2545.
Q. And you know that because your duty required you to do it?
A. Yes, sir.
Q. And not from memory?
A. Well I recollect the engine was all right.
Q. I am going back to the same question again—can you tell us one other morning except these three that you remember that particular engine, remember examining that particular drawbar, without your record?
A. I told you I examined her every morning.
Q. Why didn't you bring your record with you?
A. I don't carry them in a trunk with me. When I left up there I left all books wherever they happened to have them and God knows where they are now.
Q. You knew it might become necessary in this case?
A. No, I have a whole lot of other things I have to look after. I know that if that engine wasn't in shape she wouldn't have gone out.
Q. No engine ever went out under your inspection without being in shape?
A. Well if they did somebody else was responsible for them, not I.
210 Q. Ever anything wrong when you inspected them?
A. Not that I know of.

"That's all."

Defendant then called as a witness to testify in its behalf C. B HUMASON, who being first duly sworn, testified as follows:

Direct examination.

By Mr. CONROY:

Q. What is your name?
A. C. B. Humason.
Q. Where do you work?
A. Brier Hill shops.
Q. For what Co.?
A. The Erie.
Q. In what capacity?
A. Pipe fitter.
Q. And how long have you been working for the Erie?
A. About ten years.

Q. Do you remember the occasion of Mr. Solomon being hurt on engine 75?
A. I remember hearing about it, yes, sir.
Q. You are acquainted with Billy Welsh?
A. Yes, sir.
Q. Were you present when an inspection was made of the couplers on that engine?
A. Yes, sir.
Q. Do you know how soon after the accident that was?
A. I think it was the third day after.
Q. And were others present besides you and Mr. Welsh?
A. Yes, sir.
Q. And where was the engine when this inspection was made?
A. At the water plug at the round house.
211 Q. Did you take part in the inspection?
A. I was there.
Q. You witnessed it?
A. Yes, sir.
Q. Did you see anybody try the lever to see whether the lever would open the knuckles or not?
A. Yes, sir.
Q. Who tried the lever?
A. Mr. Herlihy.
Q. When he lifted the lever up did the knuckles open or not?
A. They opened.
Q. Did he open them by the use of the lever more than once?
A. Just once.
Q. Was there any apparent difficulty in opening them by the use of the lever?
A. I didn't see any.
Q. Did you observe the handle and the rod and the chains?
A. Yes, sir, I looked at them.
Q. What was their condition?
A. Good.
Q. Did you see them measure the side play of the drawbar in the collar?
A. Yes, sir.
Q. Do you know what the side play was of your own knowledge?
A. What?
Q. Of your own knowledge do you know what that side play was?
A. Yes, sir.
Q. How much was it?
A. 2½ inches.

Cross-examination.

By Mr. ANDERSON:

Q. Where was the engine, Mr. Humason, when you were asked to help on it?
A. At the water plug at the roundhouse.

Q. It had been taken from the place of the accident to the roundhouse?

212 A. I don't know where the engine was taken from. It was at the water plug when I seen it.

Q. What time of the day was it that you examined it?

A. I would think about nine o'clock.

Q. At night?

A. Daytime.

Q. Next morning?

A. In the morning.

Q. Of what day?

A. This would be on the 4th.

Q. On the 3rd, it would be, it was the day after the accident?

A. No, I didn't say it was the day after the accident.

Q. And you and Mr. Herlihy went over to the engine?

A. Mr. Herlihy was there, yes, sir.

Q. And you and he made this inspection, what?

A. I witnessed it.

Q. And you saw him go up to this cutting lever and you saw him take hold of it and open the knuckle by means of the cutting lever, did you?

A. Yes, sir, I saw him lift the lever.

Q. Did it open the knuckle?

A. Well the knuckle would have to open after they lift the lever and push it open.

Q. Did this pulling up on the cutting lever open the knuckle?

A. No, sir.

Q. What?

A. No, sir.

Redirect examination.

By Mr. CONROY:

Q. I thought you said it did open the knuckle when he pulled up on the lever. I thought you said it did open the knuckle; did it or didn't it?

A. I said it did, yes, sir.

213 Q. Well did you tell Mr. Anderson it didn't?

A. I don't believe I understood his question, maybe I didn't. I say it did open it.

Recross-examination.

By Mr. ANDERSON:

Q. We don't want any misunderstanding. I don't want to confuse you in any way. Now let me ask you again, did the raising of the cutting lever open the knuckle?

A. Yes, sir, it did.

Q. Oh, it did open it?

A. Yes, sir, it did.

Q. Did he try to open it more than once or just the once?

A. Just the once.

"That's all."

Defendant then called as a witness to testify in its behalf GEORGE PETERSON, who being first duly sworn, testified as follows:

Direct examination.

By Mr. CONROY:

Q. What is your name?
A. George Peterson.
Q. Where do you work?
A. Erie Railroad, over at Mosier roundhouse.
Q. What do you do there?
A. Machinist.
Q. Were you working there the time that Mr. Solomon got hurt on engine 75?
A. Yes, sir.
214 Q. And what was your job there then?
A. Machinist.
Q. Were you present a short time after the accident when the coupler was examined and tested by Mr. Herlihy?
A. I was.
Q. And where was the engine at that time?
A. She was standing outside the roundhouse at the water plug.
Q. Who was present?
A. Charles Humason, John Connors, and myself and Herlihy. I think that is all.
Q. Was Billy Welsh there at that time?
A. Yes, Billy Welsh was there.
Q. Did you see anybody operate the lever in an attempt to open the knuckle?
A. Yes, sir; we tried it.
Q. Who tried it?
A. Mr. Herlihy tried it when I was there.
Q. Did the knuckle open or not?
A. The knuckle worked all right, in good condition.
Q. Did he work the lever more than once?
A. Well, I couldn't just say whether he worked it more than once. He tried it there.
Q. Did you see them measure the side play of the drawbar?
A. I did.
Q. How much did it measure?
A. It measured about two and one half inches when the drawbar was shoved over to one side.
Q. Did you observe the handle, and the rod and the chains on the knuckle itself?
A. I did.
Q. What was their condition?
A. It seemed to be in good condition.
215 Q. Did you try the lever yourself?
A. I didn't try it myself.

Cross-examination.

By Mr. ANDERSON:

Q. You are a machinist up there?
A. Yes, sir.
Q. And you were up there when Mr. Herlihy tried to operate this knuckle?
A. I was there when they operated it.
Q. How did he do—what did he do, pull the lever?
A. Pulled the cutting lever.
Q. What had been done to that knuckle before he pulled the lever?
A. There was nothing done to it.
Q. Do you know whether there had been or not?
A. I don't know.
Q. On what day was this?
A. About June 4th.
Q. What time of day?
A. Sometime in the morning I couldn't tell you the exact time.
Q. And do you know whether anything had been done to that knuckle between the time of the accident and the time you were out there operating it?
A. I don't know of anything that had been done to it.
Q. How many times did Herlihy pull the lever?
A. Well he pulled up once that I noticed.
Q. Do you know the position that that knuckle was in before he pulled?
A. The knuckle was closed.
Q. Clear closed or part way closed?
A. Clear closed.
Q. And how far did it open?
A. Well I don't know the exact distance for the knuckles to open.
Q. Did it open clear open or part way open?
A. Why, it opened up, I couldn't just say how much it was.
216 Q. How many inches did she open?
A. I couldn't tell you exactly.
Q. Give us your best judgment?
A. My best judgment would be about eight inches.

"That's all."

Defendant then called as a witness to testify in its behalf, JOHN CONNORS, who, being first duly sworn, testified as follows:

Direct examination.

By Mr. CONROY:

Q. What is your name?
A. John Connors.
Q. Where do you work?
A. Erie Roundhouse, Mosier.

Q. What do you do there?
A. Machinist.
Q. How long have you worked there?
A. Eight years.
Q. Do you remember the occasion of Mr. Solomon being hurt on engine 75?
A. I heard something about it.
Q. Did you a short time after that see a test made, an examination made of the couplers of that engine?
A. I didn't see no test. We went up and inspected it.
Q. Do you know how soon after the accident that was?
A. I couldn't say.
Q. Do you know what the date was?
A. About the 4th of June, I think.
Q. Who were present?
A. Mr. Herlihy, Mr. Welsh, Mr. Peterson, Mr. Humason and myself.
217 Q. During that examination did you see anybody attempt to open the knuckle by raising the lever?
A. Yes, sir.
Q. Who raised the lever?
A. Mr. Herlihy.
Q. Did the knuckle open or not?
A. It opened.
Q. Was there any apparent difficulty in opening it by using the lever?
A. Not that I seen.
Q. Did Herlihy open it more than once?
A. I didn't pay any attention whether he opened it after that or not. I seen it worked all right.
Q. Did you see anybody else open it by the lever?
A. I ain't sure whether Mr. Welsh opened it or not, but I thought he did.
Q. Did you see them measure the clearance made by the side play of the drawbar?
A. Mr. Herlihy measured that.
Q. Did you look at that measurement as he measured it so as to be able to state to the jury what it was?
A. No, I didn't get down that close but I heard him say what it measured.
Q. Did you observe the handle and the rod and the chains and the knuckle?
A. I noticed the cutting lever, I think it was bent down a little.
Q. Sagged a little?
A. Sagged down in the center.
Q. Handing you "Plaintiff's Ex. A" was it sagged down in that way as shown by that photograph?
A. It didn't look to be sagged down that far.
Q. About how much was it sagged?
A. I didn't measure it, I couldn't really say just how much it was sagged.

218 Q. What is your best judgment?
A. Oh a quarter of an inch or so.

Cross-examination.

By Mr. ANDERSON:

Q. Were there any marks on the coupler where she had been battered?
A. I didn't see any.
Q. Do you remember looking for anything of that kind?
A. I didn't look for marks on the coupler.
Q. You simply went out there to see him pull this lever?
A. I went out there to see him put the gauge on and see if there was anything wrong with the coupler.
Q. And you saw him put the gauge on?
A. Yes, sir.
Q. And the gauge was to determine whether it was too high or too low?
A. Yes, sir.
Q. You were called out for that purpose?
A. Yes, sir.
Q. You stood there watching that test?
A. Yes, sir.
Q. Watching that examination?
A. Yes, sir.
Q. So you could testify to it in court?
A. I didn't know it was going to court then.
Q. But you stood there so you could tell about it later on, you were to be a witness?
A. I didn't know I was to be a witness.
Q. But you were called by your superior to go out there and make the test?
A. Yes, sir.
Q. And you saw him put the gauge on?
A. Yes, sir.
Q. And you saw it, that it was how high?
A. Thirty-three inches.
Q. And you stood by and watched him take hold of the cutting lever?
A. Yes, sir.
219 Q. Once?
A. After I seen it worked once and I seen it worked right I didn't pay any attention.
Q. He just took hold of it once?
A. Oh he might have after I went away.
Q. All you saw was once?
A. Yes, sir.
Q. But you saw him take hold of it?
A. Yes, sir.
Q. And you saw the knuckle open?
A. Yes, sir.

Q. How far did the knuckle open?
A. Far enough for the lock to let go of it.
Q. How many inches?
A. I couldn't say.
Q. Couldn't judge it?
A. No, sir.
Q. Did he have to jerk or did he come easily?
A. He didn't seem to pull very hard.
Q. You were called out there to see that?
A. Yes, sir.
Q. To see that test done, do you know whether anything had been done to that drawbar or to that knuckle at that particular time so that she would work that way?
A. No, sir.
Q. You didn't know whether she had been prepared for your test do you?
A. I did not.

"That's all."

Defendant then called as a witness to testify in its behalf, C. A. COONEY, who being first duly sworn, testified as follows:

Direct examination.

By Mr. MANCHESTER:

Q. Mr. Cooney, you live in this city?
A. No, sir, in Girard.
220 Q. Where are you employed?
A. Erie roundhouse.
Q. Are you working there now?
A. Yes, sir.
Q. In the employ of the Erie Co.?
A. Yes, sir.
Q. Mr. Cooney, I will ask you whether you recall removing the coupler from the tender of engine 75?
A. Yes, sir.
Q. When was that?
A. I think it was December, 1911.
Q. And I will ask you what was the occasion of taking it off?
A. The coupler yoke broke.
Q. Where is the coupler yoke?
A. Where the coupler is riveted onto.
Q. Is that here at the end of the tender or is it back underneath?
A. Back underneath.
Q. Is it shown in the photograph I have just handed you marked "Plaintiff's Exhibit A"?
A. No, you can't see it there. It is back under the tender.
Q. And was it broken off there?
A. Broke off.
Q. Was there anything wrong with the knuckle?

A. Not a thing.
Q. Broken back on the yoke?
A. Yes, sir.
Q. Was that the reason for its removal?
A. Yes, sir.
Q. And you say that was December 17, 1911?
A. Yes, sir.

Cross-examination.

By Mr. ANDERSON:

Q. The coupler itself was not broken?
A. No, sir.
Q. Well what was broken?
A. The coupler yoke.
Q. That is away back under the tender?
A. Yes, sir.
221 Q. So that the coupler itself is in the same shape now as it was then?
A. Yes, sir.
Q. Where is the coupler now, this coupler that you took off?
A. Up in the Brier Hill shop.
"That's all."

Defendant then called as a witness to testify in its behalf JOHN MCMULLEN, who being first duly sworn, testified as follows:

Direct examination.

By Mr. CONROY:

Q. What is your name?
A. John McMullen.
Q. Where do you reside?
A. Kent, Ohio.
Q. What is your business?
A. I have got charge of the Erie car shops there.
Q. How long have you been employed in that capacity by the Erie?
A. I have been at that point five years the first of next month.
Q. And have you had experience previous to that time in reference to the repairs of cars?
A. Yes, sir, that had been my business for the past twenty-three years.
Q. Are you familiar with what is known as the M. C. B. rules and regulations?
A. Yes, sir.
Q. Are you a member of that organization?
A. I am not a member of the organization but I have attended their conventions and been present at their meetings for the past five or six years, I guess.
222 Q. And are you familiar with their rules and regulations?

A. Yes, sir.
Q. And the standards that they have fixed for different matters?
A. Yes, sir.
Q. Have you had more or less experience in the matter of car couplers?
A. Yes, sir.
Q. And are you familiar with the different designs of car couplers?
A. Yes, sir.
Q. Are you familiar with the car couplers known as the Climax?
A. Yes, sir.
Q. Is that a standard car coupler?
A. Yes, sir.
Q. What is the clearance of that coupler provided for what is known as the side play on the collar?
A. Lateral clearance?
Q. Yes?
A. Why two and one half inches that is the M. C. B. requirements.
Q. How long has that been the M. C. B. requirements, to your knowledge?
A. Oh a number of years, I couldn't say just how many years.
Q. Could you say as a matter of fact, if you know, as to whether or not the M. C. B. requirements as to that have been adopted by the Interstate Commerce Commission?

Plaintiff objected; sustained; defendant excepted.
Mr. MANCHESTER: Note our exception and we expect the witness to answer that the Interstate Commerce Commission requirements under the Federal Laws are the same as the requirements of the Master Car Builders Association, to-wit: that there be side clearance at the carrier iron of two and one half inches.

223 Q. I will ask you, Mr. McMullen, what is the standard side play of the standard car couplers in use on the railroads of this country?
A. Two and one half inches.
Q. I will ask you, Mr. McMullen, if that side play is necessary in the operation of cars?
A. It is.
Q. And why?
A. Well in curving and in coupling up when cars are on curves, you have to shove the coupler over to one side to make the coupling.
Q. And in the movement of a train going around a curve is it necessary?
A. Yes, sir.
Q. To have that side play?
A. Yes, sir, that is why it is necessary more than anything else.
Q. Otherwise would the couplers become damaged?
A. Yes, sir, they would pull off the draft timbers. It would pull right against the timbers if it didn't have enough clearance, and spread them.
Q. Mr. McMullen, have you ever seen any design of car couplers

that had any spring arrangement that held the drawbar in the center of the collar?

A. Why there is such a patent arrangement, just a centering device but there isn't but very few cars that have got them.

Q. And why not?

A. Well I don't think they are considered practical. If they were they would have been adopted by the Master Car Builders before this.

Q. As an experienced man what would you say would be the difficulty with a design of that character?

A. Well in the first place I don't think they are necessary. If you went to couple up a car on a curve why man power couldn't shove the coupler over which sometimes it is necessary to do.
224 A man couldn't shove that coupler over to make a coupling—so that you could make a coupling. I never considered them necessary and I don't think that the Master Car Builders did. If they did they would have recommended them before now and they would have been adopted by the Interstate Commerce Commission.

Plaintiff objected to the latter portion and moved the court to strike it out.

COURT: The latter portion may be stricken out, and exception. He may give his personal opinion.

Q. Have you ever seen a coupler in use anywhere by which the drawbar could be moved in the coupler sideways by any device that could be operated from the outside of the car?

A. No, sir.

Q. Would such a device be necessary in the practical operation of trains?

A. Oh I don't think it would. There isn't any such device now in use.

Q. Is it necessary in the construction of a coupler apparatus that the drawbar would move as easily as possible in this two and one half inch space so that the brakeman could adjust it as required?

A. With the construction of the draft gear it wouldn't hardly permit of that. You have the followers up in between the castings in the back and it is pressed in tight with that spring and it holds the coupler so it is generally pretty right anyhow.

Q. Well is the Climax coupler adjusted so that a man, a brakeman could move it over that two and one half inches so as to bring it in line, I think they call it, so as to make a coupling with another car?

A. Oh, perhaps he could shove it over with his foot, I don't know, if he tried. Of course that would all depend on the
225 draft gear, the springs are in there tight and they might be some tighter than others and the coupler might swing.

Q. You have stated that the clearance is two and one half inches, is it exactly half of that on each side, the standard?

A. Well it is supposed to be about that. That is the total clearance.

Q. Now what would be the total clearance on a Climax out at the end of the coupler?

A. Well that is never taken into consideration. The clearance is always figured at the carry iron and it might swing perhaps—or it might go perhaps a half inch more. I don't think it would strike any more than that, about that I would say.

Q. Of course the arm, the movement out at the end there would depend on the length?

A. On the radius yes, sir. On the length of the swing.

Q. And to determine that would be pure mathematics?

A. Well it would be more than that. You would have to get the distance between the castings and the length of the followers and see how much swing it would have [illegible]ck on the coupler yoke, but that design, as I understand it is minor tandem draft gear and the followers are eight and one half inches long, so that there would be very little—it wouldn't swing any more than—I don't think it could go more than a half inch, I don't possibly think it could.

Cross-examination.

By Mr. ANDERSON:

Q. You are located at Erie, Ohio, or Kent, I mean?

A. Yes, sir.

226 Q. And you are in charge of the shops up there?

A. Yes, sir.

Q. That is where you repair cars for the Erie Railroad?

A. Yes, sir.

Q. And you have had a great deal of experience with the building of cars and all that sort of thing for many years?

A. Yes, sir.

Q. Now you say that the standard as you understand it, of the Master Car Builders Association, is that there shall be a clearance of an inch and a quarter on each side of the drawbar?

A. Master Car Builders Association proceedings say there shall be two and one half inch clearance.

Q. That is altogether?

A. Yes, sir.

Q. Now then you say that two and one half inches of clearance at the collar is that what you call it?

A. At the carry iron.

Q. You say out in front of the Climax coupler it would be about a half an inch more?

A. I think about that.

Q. So that the total swing out in the front would be about three inches then?

A. Yes, sir, about three inches.

Q. Now the amount of swing out here in front depends not upon the two and one half inches necessarily but it depends upon the length of the drawbar, does it not?

A. Yes, sir, and the width that it has got to swing in back there.

Q. Yes, so that you may have two and one half inches up here at the collar on some drawbars and have a swing of say four and one half might you not? That would depend, would it not, upon the length of the drawbar?

A. Well it would depend as I said on the width that it had to swing in the back, the distance between the draft timbers
227 you see the coupler comes out there like between my hands now. My hands is the draft arms and the draft spring and draft rigging comes up between them. Now of course if them are pretty close it can't swing because it will strike on the two and one half inches in the front.

Q. So that the practical swing is about three inches?

A. Well approximately.

Q. Now on an engine, however, where the drawbar is shorter or fastened differently from on your cars, with two and one half inches of clearance at these irons that you speak of, you may get a greater swing in front there?

A. I understand this is the same draft gear, this is the minor tandem draft gear, same on the engine as there is on our cars.

Q. So you say it wouldn't be over three inches, it wouldn't be four and one half inches?

A. I don't possibly see how it could be four and one half inches. It couldn't.

Q. Now I am going to ask you if there is any standard swing at the front end of the coupler?

A. No, sir, because it is governed by the standard swing at the coupler carry iron. That governs that.

Q. So there is no standard at the front?

A. No, sir.

Q. Now do you recognize——

A. Well that governs it.

Q. But assuming that you had a swing of four and one half inches here in front, by that kind of a coupler that we are speaking about, the Climax, then what would you attribute that to?

A. Why the Climax coupler wouldn't be any different from any other.

228 Q. But what would you attribute the swing of four and one half inches in front rather than three inches?

A. You couldn't get it on that draft gear.

Q. Couldn't you get it if the drawbar was longer in front than on the ordinary drawbar, if it was eighteen and three quarter inches?

A. Oh, but it isn't. Our couplers are all the same length.

Q. What are they?

A. Twenty-one and one half from the back to the coupler horn; nine and one quarter from the coupler horn to the inside of the knuckle, and the coupler horn comes within two and one quarter——

Q. How far would you say that would swing (referring to picture)?

A. It can't swing any more than the space it has got there to

swing in. You can see that that end sill is recessed for the coupler to swing in. All it can go is what that space is.

Q. Assuming that space to be two and one half inches?

A. That is as far as it can go there. This here as I said before can go one half inch further. I don't think possibly it could go any more. We can figure it out in a little while.

Q. You think it wouldn't possibly go——

A. No, sir, I don't think it possibly could. We can figure out just how much it will go. I doubt that it will go any more than one half inch.

Q. And you have built cars for a great number of years?

A. Yes, sir.

Q. Assuming that that went four and one half inches, then what would you say was the cause?

A. As I said before it couldn't. It couldn't go four and one half inches with that two and one half inch clearance.

Q. But supposing that it does go four and a half inches
229 then what could be the cause of such a swing as that?

A. Well it couldn't go that. If it went that distance the engine or the car or whatever it might be would be sent to the shop. It wouldn't be in use at all. It couldn't be used.

Q. Why not?

A. Why it would be inoperative. Our inspectors working around that engine would send it to the shop.

Q. The coupler would be inoperative—it couldn't be coupled automatically?

A. We don't allow cars or engines to run when they don't couple.

Redirect examination.

By Mr. CONROY:

Q. Did you ever figure out how much it moves in front?

A. No, sir, I never did.

Q. You are speaking now your best judgment?

A. Yes, sir. I don't think it goes any more than that. Couldn't possibly go any more and especially with that end sill on there.

Q. You are familiar with the rules of the Erie Railroad Co.?

A. Yes, sir. Not with the operating rules as much as I am with——

Q. You have seen the book of rules?

A. Yes, sir.

Q. Have one yourself?

A. Yes, sir.

Q. I will ask you if this is a book of rules of the company?

A. Yes, sir, that is one.

"That's all."

Mr. CONROY: We wish to offer at this time Rule 266 as found in the Rules and Regulations of The Erie Railroad Company. (Read by Mr. Conroy as follows:)

230 "All employes who undertake to couple cars or engines are especially warned that the coupling apparatus on such cars or engines is liable at any time to break or become defective, and that, therefore, it is extremely imprudent and hazardous to undertake to couple them until after examining them and ascertaining that it is safe to do so. Employes are required to use the utmost care and caution in coupling any cars where lumber or other freight projects over the ends of the same. They are forbidden under any circumstances to go between these or any other cars, or to expose their arms or bodies between them, unless they can do so with safety. It is required that cars be separated by at least ten feet before adjusting couplers or parts thereof, when necessary for employes to expose their arms or bodies to danger when so doing."

Defendant also introduced Rule 267, which was read as follows: "Every employe is required and warned to see for himself, before using them, that the machinery and tools which he is expected to use are in proper condition for the service required, and if not, to put them in proper condition, or see that they are so put, before using them. The company does not wish or expect its employes to incur any risks whatever from which, by exercise of their own judgment and by personal care, they can protect themselves, but enjoins them to take time in all cases to do their duty in safety, whether they may, at the time, be acting under orders of their superiors or otherwise."

(The second paragraph of this rule was not read.)

Mr. CONROY: We offer in evidence "Defendant's Exhibit No. 2," which reads as follows:

231 "Erie Railroad Company, Office of the Superintendent, Mahoning Division, Youngstown, Ohio, March 9th, 1911.

All concerned: Accidents are constantly increasing account violation of Rule 266. This rule requires that no one shall go between cars for the purpose of opening knuckles, unless the cars are at least ten (10) feet apart and are not in motion, and not then unless he has notified the conductor or person in charge. It is noticed that men jump between cars when there is not sufficient time to do the work. Sometimes they are between the cars and the engineer, through signals from someone else who does not know that another is between the cars, moves a section of the train back, and the result is personal injury, and in a great many cases death. Your attention was called to this rule February 28th. In future when men are discovered violating this rule, they will be taken out of the service. F. J. Moser, Superintendent."

The above notice is attached to this bill of exceptions and made a part hereof, marked as above stated.

Defendant then called for further cross examination JOSEPH SOLOMON, who testified further as follows:

Cross-examination.

By Mr. CONROY:

Q. Mr. Solomon, you made a written application for employment with the Erie Railroad Company, did you not?

A. Yes, sir.

232 Q. And that application was filled out in your own handwriting?

A. Yes, sir.

Q. Is that the application?

A. It looks like it.

Q. Is there any doubt about it?

A. No, sir.

Q. Is that your signature to the application?

A. Yes, sir.

Q. And is that your application or is that your signature, I mean to this receipt?

A. It looks like it.

Q. And did you sign that in front of Mr. Wheeler, a Notary Public?

A. Mr. Wheeler.

Q. Yes, this gentlemen that handsome gentleman sitting back at the end of the table?

A. I don't just remember as it was, but I remember of being up in some office there on Holmes Street.

Q. At any rate that is your signature, Joseph Solomon?

A. Yes, sir.

Q. Witness: E. S. Evans, do you know him?

A. Yes, that is Stanley ain't it?

Q. Was he there when you signed it?

A. No, sir.

Q. At that time didn't you receive a book of rules?

A. No, sir.

Q. Didn't Mr. Evans hand you a book of rules?

A. No, sir.

Q. Didn't Mr. Evans hand you a book of rules, the number of which was 8332?

A. No, sir.

Q. Or anybody else there hand you such a book?

A. Nobody, the only thing ever I got off the Erie was switch key and lamp and flag.

Q. They didn't give you a book there that day?

A. No sir, nor any time.

233 Q. You never saw a book of rules, number 8332?

A. No, sir.

"That's all."

... CONROY: Your Honor I offer in evidence Defendant's Exhibit

No. 4. I will just read a portion of this to the jury,—what I want to call their attention,——

"Book of Rules No. 8332.

(Paragraphs 1 and 2 do not apply to Shop Employes.)

1. I hereby acknowledge receipt of a copy of the rules and regulations for the government of the Operating Department of said Railroad Company, and all amendments thereto, and also a copy of the current time table, and agree to familiarize myself with and observe all the same, and to keep advised of such amendments to said rules as may hereafter be made.

2. And I hereby acknowledge that I have been informed of the character of the employment I am about undertaking and the duties connected therewith; that I have been notified that there are numerous bridges, Buildings, Tunnels, Viaducts, Stock-Yard Chutes, Mail Cranes, Platforms and coal Chutes and other obstructions now located and others may be constructed from time to time which will endanger my life and limb, and I agree in consideration of my employment to familiarize myself with the same and use due care for my safety without further notice from the Railroad Company, and I accept notice from said Railroad Company that few, if any, of the aforesaid buildings or obstructions will clear a man riding on top or side of a car, and that I *am* use constant care for my safety in working about same, I also understand and agree that when it is
234 necessary for me to go into the yards of other companies, I must exercise the same care about looking out for obstructions which may be close to track.

3. I also agree to examine and know for myself that the ways, works or machinery, connected with or used in my employment are at all times in safe and proper condition and agree to give immediate notice in writing to some person superior to myself in the service of the company of any defect in the condition of the ways, works or machinery connected with or used in my employment and if I continue to use such ways, works or machinery with a defect or defects therein, I agree to assume the risk of an accident as a risk incident to my employment, and hereby waive the provisions of any and all statutes or laws with respect thereto.

(Signed) JOSEPH SOLOMON.

Read over in my presence before signing:

Witness:

E. S. EVANS,

Address, Youngstown, Ohio.

(This application is attached to this bill of exceptions and made a part hereof, marked as above stated.)

Mr. CONROY: We wish to offer in evidence portion of page 726 of the proceedings of the Master Car Builders Association, 144, 1910.

Plaintiff objected; sustained.

Mr. CONROY: Then we offer as much as was read by the witness.

Court then adjourned to 8:30 A. M. of the following day, at which time the trial of this case was continued as follows:

Defendant then called as a witness to testify in its behalf,
235 E. STANLEY EVANS, who being first duly sworn, testified as follows:

Direct examination:

By Mr. CONROY:

Q. What is your name?
A. E. Stanley Evans.
Q. You live in the city?
A. Yes, sir.
Q. And have for a long time?
A. All my life excepting a few years.
Q. Where do you work now?
A. At the Erie railroad.
Q. In what capacity?
A. I am clerk to the general yardmaster.
Q. Were you working for the Erie Railroad January 7, 1910?
A. Yes, sir.
Q. In what capacity were you working at that time?
A. Clerk to the general yardmaster.
Q. Same as you are holding now?
A. Yes, sir.
Q. Showing you Defendant's Exhibit No. 4 I will ask you if you ever saw that paper before?
A. Yes, sir, I have.
Q. Did you see Mr. Solomon sign it?
A. Yes, sir.
Q. At that time did you give him a book of rules?
A. Yes, sir.
Q. And did you note on the receipt the number of the book you gave him?
A. Yes, sir.
Q. In what color of ink?
A. Red.
Q. If you had no books at that time or had run out of books at that time so that you would have been unable to give the ap-
236 plicant a book — rules what would have been, what was your custom?
A. Why I would pigeon hole the papers till they were completed and after I got my book of rules I would call him in and give it to him and complete the papers.
Q. Did you give to all of the applicants a book of rules?
A. Yes, sir.
Q. And I suppose there were a good many applicants and a good many books given away?
A. Yes, sir.
Q. Are you testifying now more to what your custom was than any distinct recollection?
A. More to what my custom is than my recollection of it.

Cross-examination.

By Mr. ANDERSON:

Q. You are the chief clerk in the yard office are you?
A. Yes, sir.
Q. And when applications are made you help fill them out do you or some of your clerks there?
A. Yes, sir, we help them fill it out once in a while.
Q. You yourself or the clerks?
A. Sometimes I do it the applicant can't make it.
Q. And sometimes the other clerks in the office under you?
A. No, sir, I always do that.
Q. That is your custom?
A. Yes, sir.
Q. Is Mr. Wheeler's office, the claim agent's office, in connection with yours?
A. No, sir.
Q. Well I notice there that he signed, was he there at that time?
A. No, sir.
Q. Where was he?
A. He was down at his office.
Q. At his claim office?
A. (No response.)
237 Q. And do you say to this jury that you don't remember from recollection the occasion of signing this?
A. I do not, no sir.
Q. But you say it is your custom to give books of rules?
A. Yes, sir.
Q. And you think that from that custom that you observe in the office that Solomon must have gotten a book of rules?
A. Yes, sir.
Q. You don't recall of him being instructed by you as to the fact that there are numerous bridges, buildings, tunnels, viaducts, stock-yard chutes, mail cranes, platforms and coal chutes and other obstructions now located and others may be constructed from time to time which will endanger my life and limb did you instruct him, do you remember of instructing him — those things?
A. I always do tell them to read it over carefully.
Q. What is that?
A. I always tell them to read it over.
Q. That is your custom in the office?
A. Yes, sir.
Q. But as far as informing yourself, telling them that there are buildings, tunnels and chutes, pointing them out, you don do anything of that kind?
A. Sometimes I do, yes, sir.
Q. But it is your custom in the office to tell them to read the application, after they read the application then they are after a job,— or do they sign it hurriedly as a rule?
A. As a rule they read what they are signing.
Q. As a rule would you say that to this jury?

A. Yes, sir, as a rule they do; they take particular care about their application.

238 Q. When they are after a job, looking for a job, they sign up a lot of these papers do they?

A. Yes, sir.

Q. You have no recollection of Solomon receiving a book of rules?

A. I have no recollection giving it to him.

Redirect examination.

By Mr. CONROY:

Q. I suppose the book of rules of the company, the receipt told all about bridges and viaducts and other things?

A. I think it is included in the book of rules.

Q. Now the number in red ink on the corner there, is that in your handwriting?

A. Yes, sir.

Q. Was it possible for you to make a notation there in red without giving him a book?

A. No, sir.

Q. After he got the book and lantern and so forth he left your office?

A. Yes, sir.

Q. And where did you send him to?

A. I probably told him to report on the extra list.

Q. Do you know about him going to Mr. Wheeler's office at 17 North Phelps Street?

A. They usually send them down there, yes, to have the seal put on the papers.

Recross-examination.

By Mr. ANDERSON:

Q. Now you say you probably told him to report on the extra list?

A. I told him to report on the extra list, that is what I would do.

Q. But you don't remember that you did that?

A. No I don't remember of doing it.

239 Q. Sometimes you run out of books of rules down there don't you?

A. Yes, sir.

Q. And in fact there are a great number of persons making application for employment?

A. Yes, sir.

Q. And then sometimes don't you take the application that you have and then don't you put the book of rules with the application and pigeon hole it for some time?

A. Well I couldn't do that.

Q. Well I say don't you do that?

A. No, sir, because if I had the book of rules I would have the

papers complete; I sometimes take the papers and don't have the book of rules and then hold the papers till I get the book of rules.

Q. That is your usual custom?

A. Yes, sir.

Q. Do you ever depart from your usual custom, do you ever make mistakes?

A. We make mistakes like anybody else.

Q. Don't men go to work sometimes before they fill this application out?

A. Sometimes they do, yes, sir, occasionally.

Redirect examination.

By Mr. CONROY:

Q. I suppose that is in case of immediate emergency?

A. Yes, sir.

Q. Haven't got time to fill out a long application, I suppose?

A. Yes, sir.

Q. That's all.

"That's all."

Mr. MANCHESTER: If the court please I don't believe yesterday we offered our Exhibit Number One, photograph, or Exhibit
240 Three, showing the cuts of the coupler. We now offer these exhibits. (These exhibits are attached to this bill of exceptions and made a part hereof.)

COURT: All of the exhibits on both sides which have been identified may be received in evidence. I don't recall that there has been any objection to any of them.

Defendant rested.

Whereupon the plaintiff reoffered himself as a witness to testify in his own behalf in rebuttal.

JOSEPH SOLOMON, having been previously sworn, testified as follows:

Direct examination.

By Mr. ANDERSON:

Q. Mr. Solomon, at the point of the accident how was the track as to being in a curve or on a straight track.

A. Why it was just about a straight track.

"That's all."

Plaintiff rested.

COURT: Defendant's objection to answer (shown on page 124) which was taken under consideration by the court is overruled and exception to the defendant.

Mr. MANCHESTER: I don't know whether that was followed with a motion to strike out, if not I want to make it now.

241 COURT: It may follow with a motion and motion overruled, and exception.

Defendant at the close of all the evidence renews its motion made at the close of plaintiff's evidence that the court direct the jury to return a verdict in favor of the defendant.

Motion overruled; defendant excepted.

The attorneys for the respective parties then submitted to the court the following requests, in writing, to be charged to the jury before argument:

Requests to Charge.

Plaintiff requests the court to charge the jury before argument of counsel the following propositions of law, as applicable to the above entitled cause, separately and not as a series:

1.

It was the positive duty of defendant company before hauling or permitting its locomotive tender to be hauled or used as set out in plaintiff's petition, to equip said tender with a coupler that would couple automatically upon impact without the necessity of plaintiff going between the ends of said tender and car to effect a coupling. (Given.)

2.

If you shall find by a preponderance of the evidence that defendant hauled or permitted its locomotive tender to be hauled or used, as set out in plaintiff's petition, then it was the positive duty of defendant company to equip its said tender with a coupler that would couple automatically upon impact, without the necessity of

242 plaintiff going between the ends of said tender and car; and if you find that defendant had equipped its tender with a coupler that was so defective and inoperative that it would not couple onto said car automatically upon impact, without the necessity of plaintiff going between the ends to effect a coupling, then I charge you that defendant was guilty of actionable negligence. (Given.)

3.

If you shall find by a preponderance of the evidence that defendant hauled or permitted its locomotive tender to be hauled or used, and that it had equipped its locomotive tender with a coupler that was so defective and inoperative, that it became necessary for plaintiff to go between the ends of said tender and car to effect said coupling, as set out in plaintiff's petition; and you find that such defective and inoperative coupler was the direct and proximate cause of plaintiff's injuries, if any, then I say to you that your verdict must be for the plaintiff. (Given.)

4.

If you shall find from a preponderance of the evidence in this case that defendant hauled or permitted its locomotive tender to be hauled or used; and that it had equipped said tender with a coupler that was so defective and inoperative that it became necessary for plaintiff to go between the ends of said tender and car to effect a coupling, as set out in plaintiffs' petition; and you shall further find that such defective and inoperative condition of said coupler directly and proximately resulted in plaintiff's injuries, if any; then I charge you that the plaintiff shall not be deemed to have assumed the risk occasioned by such defective and inoperative coupler, al-
243 though continuing in the employment of defendant company after the use of such coupler had been brought to his knowledge, if you find he so continued in said employment; and I furthermore charge you that plaintiff shall not be held to have contributed to his own injuries. (Given.)

5.

If you shall find by a preponderance of the evidence that defendant hauled its locomotive tender or permitted it to be hauled or used, as set out in plaintiff's petition, then it became and was the duty of defendant to exercise ordinary care to keep the rear coupler on said tender in working order, so that it would couple automatically upon impact, without the necessity of plaintiff going between the ends of said tender and car to effect a coupling. (Given.)

6.

If you shall find by a preponderance of the evidence that defendant hauled its locomotive tender or permitted it to be hauled or used, as set out in plaintiff's petition, then it became and was the duty of defendant to exercise ordinary care to keep the rear coupler on said tender in working order, so that it would couple automatically upon impact without the necessity of plaintiff going between the ends of said tender and car to effect a coupling; and if you shall further find that defendant failed and neglected to perform its duty, as set out in plaintiff's petition, then I charge you that defendant company would be guilty of actionable negligence. (Given.)

7.

If you shall find by a preponderance of the evidence that defendant hauled its locomotive tender or permitted it to be hauled
244 or used, as set out in plaintiff's petition, then it became and was the duty of defendant to exercise ordinary care to keep the rear coupler on said tender in working order, so that it would couple automatically upon impact without the necessity of plaintiff going between the ends of said tender and car to effect a coupling; and if you shall further find that defendant failed or neglected to perform its said duty, as complained of in plaintiff's petition, and that injuries to plaintiff, if any, were the direct and proximate result

of such failure or neglect, then I charge you that your verdict must be for the plaintiff. (Given.)

8.

If you find that at the time plaintiff attempted to couple said locomotive tender and said car, as set out in plaintiff's petition, that the track upon which said locomotive tender and car then was lay in a slight curve, then I charge you that such fact can not be considered by you as in any manner excusing defendant company from the positive duty of equipping its said tender with a coupler that would couple automatically upon impact without the necessity of plaintiff going between the ends of said tender and car to effect such coupling. (Refused.)

Defendant's Requests to Charge.

Now comes Erie Railroad Company and respectfully asks the court to charge the jury before argument as follows:—

First A. You are directed to return a verdict for the defendant.

Or, if the court should refuse so to charge, then the defend-
245 ant asks that the court give each of the following requests to the jury before argument, separately and not as a series. (Refused.)

First B. If you find that the plaintiff, Joseph Solomon, in attempting to kick over the drawbar in question, was guilty of gross negligence which directly contributed to produce his injuries, he cannot recover in this case, and your verdict must be for the defendant. (Refused.)

Second. If you find that the coupler in question on engine No. 75, at the time Mr. Solomon was injured, would couple automatically by impact, your verdict must be for the defendant. (Refused.)

(Omits question of necessity of going between cars to adjust.)

Third. If you find that it wa s not necessary for the plaintiff to attempt to kick over the draw-bar while the locomotive was in motion, and within a distance of approximately 2½ feet, as claimed by him, from the car to which the coupling was to be made, your verdict must be for the defendant. (Refused.)

(Omits question of defective coupler.)

Fourth. Even though it should appear that the coupler was in some manner defective, as claimed by plaintiff, still the plaintiff cannot recover unless such condition of the coupler was the proximate cause of his injuries. (Given.)

Fifth. If you find that the proximate cause of plaintiff's injuries solely was his act in attempting to kick over the draw-bar with his foot while the locomotive was in motion, and while in close proximity to the car to which the coupling was to be made, your verdict must be for the defendant. (Given.)

246 Sixth. If you find there was no immediate necessity for the plaintiff to attempt to kick over the draw-bar in question, while the engine was in motion, and in close proximity to the box car to which it was intended to couple, and that the plantiff

could have performed his duties in connection with making such coupling in safety, either by adjusting the coupler before the locomotive started in on the switch, or by adjusting it before within ten feet of his car or by signaling the engineer to stop after the locomotive had passed onto the switch, your verdict must be for the defendant. (Refused.)

(Taken from jury question as to plaintiff's knowledge of rule.)

Seventh. If you find that the coupler in question was not defective in any one or more of the particulars claimed by plaintiff, your verdict must be for the defendant. (Given.)

Eighth. If you find that the side clearance of two and a half inches at the hanger was a proper side clearance, and such as ordinary care required under the circumstances, your verdict must be for the defendant. (Refused.)

(Omits question of defective coupler.)

Ninth. If you find that the plaintiff's injuries were caused solely by his own conduct in attempting to kick over the draw-bar with his foot, and in his method and manner of attempting to do so while the locomotive was in motion and approaching and in close proximity to the box car in question, your verdict must be for the defendant. (Refused.)

(Giving above by Court would determine question of con. neg. as a matter of law.)

Tenth. If you find that the defendant exercised ordinary care to keep the coupler on the tender of engine No. 75 in working
247 order so that the same would couple automatically by impact, without the necessity of men going between the ends of the cars, your verdict must be for the defendant. (Given.)

Eleventh. If you should find that it was necessary for plaintiff to adjust said coupler in position and there was a rule of the company, of which the plaintiff had knowledge, or should have had in the exercise of ordinary care, providing how the same might be done in safety, and plaintiff violated that rule, and while doing so was injured, he cannot recover and your verdict should be for the defendant. (Refused.)

(Determines question as a matter of law.)

Twelfth. If you should find that there was a rule of the company, of which the plaintiff had knowledge, or should have had in the exercise of ordinary care, governing the actions of plaintiff in reference to the coupler when the same needed adjustment, as is claimd in this case, and the plaintiff violated that rule, and such violation was the proximate cause of his injuries, then and in that event, he cannot recover, and your verdict should be for the defendant. (Refused.)

(Unless sole prox. cause.)

Whereupon the court charged the jury before argument upon the law and issues joined herein, as follows:

GENTLEMEN OF THE JURY: Before argument of counsel I have some instructions to give to you as applicable to this case. These instructions are in writing and will be with you in your juryroom. After argument of counsel the court will have further instructions

to give to you orally and not in writing and the mere fact that the instructions before argument are in writing and those after
248 argument are oral and not reduced to writing, should attach no greater importance to those in writing merely by reason of that fact alone. In other words all that the court shall give you both before and after argument constitutes all of the law applicable to the case.

It was the positive duty of defendant company before hauling or permitting its locomotive tender to be hauled or used as set out in plaintiff's petition, to equip said tender with a coupler that would couple automatically upon impact without the necessity of plaintiff going between the ends of said tender and car to effect a coupling.

If you shall find by a preponderance of the evidence that defendant and hauled or permitted its locomotive tender to be hauled or used as set out in plaintiff's petition, then it was the positive duty of defendant company to equip its said tender with a coupler that would couple automatically upon impact, without the necessity of plaintiff going between the ends of said tender and car; and if you find that defendant had equipped its tender with a coupler that was so defective and inoperative that it would not couple onto said car automatically upon impact, without the necessity of plaintiff going between the ends to effect a coupling, then I charge you that defendant was guilty of actionable negligence.

If you shall find by a preponderance of the evidence that defendant hauled or permitted its locomotive tender to be hauled or used, and that it had equipped its locomotive tender with a coupler that was so defective and inoperative, that it became necessary for plaintiff to go between the ends of said tender and car to effect said coupling, as set out in plaintiff's petition; and you find that such
249 defective and inoperative coupler was the direct and proximate cause of plaintiff's injuries, if any, then I say to you that your verdict must be for the plaintiff.

If you shall find from a preponderance of the evidence in this case that defendant hauled or permitted its locomotive tender to be hauled or used; and that it had equipped said tender with a coupler that was so defective and inoperative that it became necessary for plaintiff to go between the ends of said tender and car to effect a coupling, as set out in plaintiff's petition; and you shall further find that such defective and inoperative condition of said coupler directly and proximately resulted in plaintiff's injuries, if any; then I charge you that the plaintiff shall not be deemed to have assumed the risk occasioned by such defective and inoperative coupler, although continuing in the employment of defendant company after the use of such coupler had been brought to his knowledge, if you find he so continued in said employment; and I furthermore charge you that plaintiff shall not be held to have contributed to his own injuries.

If you shall find by a preponderance of the evidence that defendant hauled its locomotive tender or permitted it to be hauled or used, as set out in plaintiff's petition, then it became and was the duty of defendant to exercise ordinary care to keep the rear coupler on said

tender in working order, so that it would couple automatically upon impact, without the necessity of plaintiff going between the ends of said tender and car to effect a coupling.

If you shall find by a preponderance of the evidence that defendant hauled its locomotive tender, or permitted it to be hauled
250 or used, as set out in plaintiff's petition, then it became and was the duty of defendant to exercise ordinary care to keep the rear coupler on said tender in working order, so that it would couple automatically upon impact without the necessity of plaintiff going between the ends of said tender and car to effect a coupling; and if you shall further find that defendant failed and neglected to perform its said duty, as set out in plaintiff's petition, then I charge you that defendant company would be guilty of actionable negligence.

If you shall find by a preponderance of the evidence that defendant hauled its locomotive tender or permitted it to be hauled or used, as set out in plaintiff's petition, then it became and was the duty of defendant to exercise ordinary care to keep the rear coupler on said tender in working order, so that it would couple automatically upon impact without the necessity of plaintiff going between the ends of said tender and car to effect a coupling; and if you shall further find that defendant failed or neglected to perform its said duty, as complained of in plaintiff's petition, and that the injuries to plaintiff, if any, were the direct and proximate result of such failure or neglect, then I charge yo uthat your verdict must be for the plaintiff.

Even though it should appear that the coupler was in some manner defective, as claimed by plaintiff, still the plaintiff cannot recover unless such condition of the coupler was the proximate cause of his injuries.

If you find that the proximate cause of plaintiff's injuries solely was his act in attempting to kick over the draw-bar with his foot while the locomotive was in motion, and while in close proximity to the car to which the coupling was to be made, your verdict must be for the defendant.

251 If you find that the coupler in question was not defective in any one or more of the particulars claimed by plaintiff, your verdict must be for the defendant.

If you find that the defendant exercised ordinary care to keep the coupler on the tender of engine No. 75 in working order so that the same would couple automatically by impact, without the necessity of men going between the ends of the cars, your verdict must be for the defendant.

Plaintiff excepted to the court's refusal to charge his request number eight before argument.

Plaintiff excepted to the court's charging defendant's request fourth before argument.

Plaintiff excepted to the court's charging defendant's fifth request before argument.

Plaintiff excepted to the court's charging defendant's seventh request before argument.

Plaintiff excepted to the court's charging defendant's tenth request before argument.

Defendant excepted to the court's refusal to charge its first (A) request before argument.

Defendant excepted to the court's refusal to charge its first (B) request before argument.

Defendant excepted to the court's refusal to charge its second request before argument.

Defendant excepted to the court's refusal to charge its third request before argument.

Defendant excepted to the court's refusal to charge its sixth request before argument.

Defendant excepted to the court's refusal to charge its eighth request before argument.

252 Defendant excepted to the court's refusal to charge its ninth request before argument.

Defendant excepted to the court's refusal to charge its eleventh request before argument.

Defendant excepted to the court's refusal to charge its twelfth request before argument.

Defendant excepted to the court's charging plaintiff's request number one before argument.

Defendant excepted to the court's charging plaintiff's request number two before argument.

Defendant excepted to the court's charging plaintiff's request number three before argument.

Defendant excepted to the court's charging plaintiff's rquest number four before argument.

Defendant excepted to the court's charging plaintiff's request number five before argument.

Defendant excepted to the court's charging plaintiff's request number six before argument.

Defendant excepted to the court's charging plaintiff's request number seven before argument.

Counsel for the respective parties then proceeded with their arguments to the court and jury upon the law and issues joined herein.

Counsel for plaintiff then submitted to the court, in writing, the following interrogatories to be submitted to the jury with the general charge:

253 *Request for Submission of Interrogatories.*

Plaintiff requests the Court to instruct the jury, that if they render a general verdict, either for plaintiff or for defendant, they shall answer the following interrogatories:

1.

At the time of the accident to plaintiff, was the draw-bar in such condition as necessitated plaintiff to line up the draw-bar before a coupling could be made?

—— ——, *Foreman.*

2.

At the time of the accident to the plaintiff, could plaintiff open the knuckle solely by reason of the cutting-lever?

—— ——, *Foreman.*

3.

At the time of the accident to plaintiff, was it necessary for plaintiff to open the knuckle by hand?

—— ——, *Foreman.*

And thereupon the court charged the jury after argument upon the law and issues joined herein, as follows, to-wit:

GENTLEMEN OF THE JURY: The issues of fact made by the pleadings and upon trial, between this plaintiff, Mr. Solomon, and the defendant, the Erie Railroad Company, are now submitted to you for your determination. As you will readily understand, the plaintiff in this action seeks to recover damages of defendant railway
254 company for what he claims to have been a breach of a certain statutory law of this state. The statutory law of this state requires each railroad company to equip each locomotive tender with a coupler which will couple automatically by impact without the necessity of men going between the ends of cars. In other words the law of this state requires each railroad company, and this defendant company, to equip each of its locomotive tenders with a coupler which shall couple automatically with any other car to which they desire to make a coupling, without the necessity of men going between the ends of the cars to adjust the coupler at the time the coupling is desired to be made.

The first question of fact for you to consider, logically, is whether or not the defendant company has been guilty of a breach of this statute. Counsel have stated to the Court and the Court has stated to counsel in your hearing that the duty of the railroad company to primarily equip its cars and locomotive tenders with such a coupler is absolute, that is the Erie railroad company was bound absolutely without any qualification to primarily equip this locomotive tender, number 75, with such a coupler as would couple by impact with any other car or tender without the necessity of men going between that tender and any other car to make the coupling. Although the duty of the railroad company primarily to equip its tender with an automatic coupler is absolute, the duty owing by the railroad company to keep such a coupler effective and operative is to the extent that they must exercise every reasonable precaution, ordinary care, to keep such an automatic coupler in an operative condition, and the primary question for you to determine is as to whether or not
255 this locomotive tender was primarily equipped with such a coupler and as to whether or not the defendant company has exercised ordinary care to keep such a coupler in an effective, operative condition. This question must be determined by the weight of the evidence here adduced. Before the plaintiff can recover, the burden is upon him to show by a preponderance of the weight of the evidence that fact to be probably true.

By the preponderance of the weight of the evidence I mean the greater weight of the evidence, and in considering the weight of the evidence it is proper for you to take into consideration the interest of the witnesses if any they have, the opportunity they had to see or know that concerning which they testify, as well as their manner and demeanor upon the stand, and in considering the weight of the evidence upon this question of fact, you will bear in mind that the number of witnesses that testified either pro or con upon any given question of fact does not necessarily determine the weight of the evidence as to that fact, although those two facts may coincide. That is, the number of witnesses and the weight of the evidence may coincide, but the number of witnesses does not necessarily determine the weight of the evidence. That is a question of fact for you to determine after a full and careful consideration of all the circumstances surrounding the witnesses at the time of the accident and their ability to see and know and properly relate those things concerning which they testify.

Evidence has been received in this case bearing upon the condition of this coupler for some time prior to the accident and for some time subsequent to the accident. That evidence was only received to aid you in determining the condition of the coupler at the
256 time of the accident, because it is the condition of the coupler at the time of the accident which must determine the rights of these parties.

If you shall find primarily that the plaintiff has failed to show by the greater weight of the evidence that the coupler was not defective or inoperative at the time of the accident then your labors cease entirely and your verdict must be for the defendant, because as I have said the basic fact of this case is the proof by the plaintiff of the probable fact that the coupler was inoperative by reason of the negligence of the defendant company at the time of the accident, but if you shall conclude after a careful consideration of all the evidence that the coupler was inoperative at the time of the accident, and that defective condition was by a failure of the defendant company to exercise all reasonable precaution in reference to that, then I say to you that defendant company was guilty of actionable negligence.

In addition to proving the fact that the defendant company was guilty of actionable negligence it is equally necessary that the plaintiff prove by the greater weight of the evidence that such negligence of the defendant company was the proximate cause of the injuries complained of by him, and this is a question of fact for you to determine,—to determine whether or not, if you find primarily the defendant company to have been guilty of actionable negligence, that negligence of defendant company was the proximate and direct cause of the injury of which he complains. If the negligence of the defendant company was not the direct and proximate cause of the injury but his injuries were brought about by other than the negligence of the defendant company and solely so, then your verdict necessarily must be for the defendant company.

257 Evidence has been received in this action tending to show a certain rule which was made and promulgated by defendant company and I say to you that if you shall find as a matter of fact that such a rule was made and promulgated and brought to the attention of the plaintiff or if he should have known of it in the proper discharge of his duties, owing by him to the defendant company, and he failed to observe such a rule, then I say to you as a matter of law that he was guilty of negligence and even though the plaintiff may have been guilty of negligence in the disobedience of that rule, that does not necessarily bar his right of recovery, because if you should find that his accident was brought about by the concurring negligence of both the defendant company and himself, then he is entitled to recover.

Most of you, as jurors, have sat upon cases wherein the Court has given you the rule of contributory negligence. That rule has no application to this case and I repeat to you that if you shall find first that defendant company was not guilty of any actionable negligence, then plaintiff cannot recover. If they were guilty of actionable negligence but the same was not the proximate cause of his injury, he cannot recover. If his accident was brought about by the sole negligence, the sole negligence of plaintiff, he cannot recover. If it was brought about by the concurring, combined, negligence of the defendant company and of himself, then he is entitled to recover and in the situation it is proper for you to consider his actions and his demeanor in determining whether he was guilty of such negligence.

It has been stated by counsel and given to you as an instruction before argument that in nowise can plaintiff be guilty of assumed risk, which is a rule which had possibly been given to you

258 heretofore in damage cases. The mere fact that the plaintiff may have known that the coupler was not working properly or was not effective, if that be a fact, and he continued in the employment, would in no wise effect his right of recovery, but what he may have known of the situation is a proper element for you to consider in determining whether or not his injuries were brought about by the sole negligence of himself. If the plaintiff is entitled to recover in this case he is entitled to recover full and whole compensation and by that I mean he would be entitled to recover compensation for such pain and suffering as you shall find he has sustained in the past as a direct result of his injuries; it would include as well compensation for such financial loss by way of decreased earning capacity that he has suffered in the past as a direct result of his injury. It would include as well compensation for such pain and suffering, decreased earning capacity, and inability to get around and care for himself in the ordinary duties and cares of ordinary life as you shall find it is reasonably certain to come to him in the future as a direct result of his injuries.

I do not go at length at this time to instruct you with reference to the duties owing by one to the other because I take it there are some eight or ten instructions given to you before argument which cover this point.

In the event you shall make a finding for the plaintiff or defend-

ant in this case, in that situation you are required to make three findings of fact, sometimes called special verdicts. These special verdicts are each in the form of a question and must be answered by you through your foreman in writing and are only to be answered by you in the event you make a general finding. In the event you shall disagree or be unable to make a general finding you
259 are not to answer these questions, but in the event you arrive at a general verdict, you are then required to answer them. The first one reads as follows: "At the time of the accident to plaintiff was the drawbar in such condition as necessitated plaintiff to line up the draw-bar before a coupling could be made." The second one reads: "At the time of the accident to the plaintiff, could the plaintiff open the knuckle solely by reason of the cutting lever?" The third one reads: "At the time of the accident to plaintiff was it necessary for plaintiff to open the knuckle by hand?" Each of these questions or findings of fact can be answered by the use of the words "Yes" or "No", and underneath your answer your foreman should sign his name. The reading of one of those interrogatories brings to mind a fact concerning which I should possibly have instructed you, and that is with reference to the side play of the drawbar. The plaintiff in this action seeks to recover not only upon the ground that the coupler and coupling apparatus, knuckle and pin, itself was defective, but seeks to recover as well upon the ground that the drawbar had an unreasonable amount of side play and I say to you as a matter of fact, if you shall find that the drawbar in this action had an unreasonable amount of side play, because it is an admitted fact, or if not an admitted fact the Court says to you as a matter of law that it must have had some side play,—if you shall find as a matter of fact that it had an unreasonable amount of side play, then that would not be a proper compliance with the statute under which this action is brought. So that, to sum up the question, if you shall find as a matter of fact that the knuckle was either worn or battered or that the pin was rusted or that the cutting lever upon proper manipulation would not open the knuckle, or if you shall find that there was an unreasonable amount of side
260 play in the drawbar, if you find those facts, to be facts then I say to you as a matter of law that if those facts made it reasonably necessary for the plaintiff in the proper performance of his duty to go between the ends of the cars in order to make the coupling, then he is entitled to recover and if he has failed to show those facts then he is not entitled to recover.

You may now retire.

Mr. MANCHESTER: If your honor please, etc.

COURT: It has been suggested by counsel that the court should call your attention to a certain portion of the statute and I will do so. The law requires that each railroad company equip its locomotive tenders with a coupling apparatus which shall couple by impact and the purpose of this statute is so that men in the discharge of the duties owing by them to the company shall not be required to go between cars to make a coupling, and the question is submitted to

you to determine whether or not as a matter of fact in this particular situation the coupling apparatus and drawbar was in such condition as to reasonably require the plaintiff to go between the engine and car to make the coupling. In other words, if the coupler and drawbar was in such condition so that it was not reasonably necessary for plaintiff to go between the engine and car, then in no wise can he recover, but on the other hand if you shall find by the greater weight of the evidence that the drawbar had an unreasonable amount of side play, or that the coupling apparatus itself was in such a condition as reasonably required the plaintiff in the proper discharge of his duties to defendant company, to go between the engine and car, then the plaintiff is entitled to recover. The question as to
261 whether, in this particular situation, the apparatus and drawbar was in such a condition as made it reasonably necessary for plaintiff to go in there is a question of fact submitted to you by the Court under these instructions.

You may now retire.

Plaintiff excepted generally to the charge of the court.

Defendant excepted generally to the charge of the court.

The above and foregoing comprises all the testimony introduced in the trial of the case, given in the order as herein appears as shown by the stenographic notes takes on the trial, of which the foregoing is a true and correct transcript.

C. E. PETERSON,
Ass't Official Steno.

The above stenographer's report contains all the evidence offered by either party in the trial of the case, the requests to charge before argument, the charges of the court both before and after argument, and exceptions thereto, together with all objections and exceptions to the introduction or exclusion of evidence taken during the trial, which were made during the trial, and at the time the evidence was being introduced, as shown by said report, and in the order therein given, and the jury having found in favor of the plaintiff, the defendant within three days made and filed its motion for a new trial, but the Court overruled said motion for a new trial, and rendered judgment upon the verdict and said defendant excepted to said ruling of said court in overruling the said motion for a new trial and rendering judgment on the verdict (as reduced to writing by the Court, as shown by the Journal entry in said case) and also to the ruling of the Court upon objections to the evidence which were made during the trial as shown by the above report of the
262 evidence; and excepts to the charge of the Court as stated, before and after argument; and prays that this, its bill of exceptions in that behalf might be allowed.

And forty days from the overruling of said motion for new trial having been given the defendant in which to prepare, have allowed, signed and sealed this bill of exceptions and have the same entered upon the journal of said court.

Now within forty days from the overruling of said motion for new

trial, to wit: on the 4th day of May, A. D. 1912, the above bill of exceptions is placed in the hands of the Clerk.

Now within fifteen days after said forty days, to wit: on the 16th day of May, A. D. 1912, the clerk of courts transmitted said bill of exceptions, together with all the amendments and objections thereto, to the trial judge.

Whereupon the above bill of exceptions is allowed by the court, signed and sealed, and upon motion of defendant ordered to be made part of the record in this case but not to be spread upon the Journal.

This 16th day of May, 1912.

W. P. BARNUM,
Trial Judge.

(Duly certified.)

DEFENDANT'S EXHIBIT NUMBER 2.

Erie Railroad Company.

Office of Superintendent Mahoning Division.

YOUNGSTOWN, OHIO, March 9th, 1911.

All concerned:

Accidents are constantly increasing account violation of Rule 266.

263 This rule requires that no one shall go between cars for the purpose of opening knuckles, unless the cars are at least ten (10) feet apart and are not in motion, and not then unless he has notified the conductor or person in charge. It is noticed that men jump between cars when there is not sufficient time to do the work. Sometimes they are between the cars and the engineer, through signals from some one else who does not know that another is between the cars, moves a section of the train back, and the result is personal injury, and in a great many cases death. Your attention was called to this rule February, 28th. In future when men are discovered violating this rule, they will be taken out of the service.

F. J. MOSER,
Superintendent.

DEFENDANT'S EXHIBIT NUMBER 4.

Erie Railroad Company.

Chicago & Erie R. R. New Jersey & New York R. R.
New York, Susquehanna & Western R. R.

Application for Employment.

To be filled by applicant in his own hand writing, and all statements to be made under oath.

1. Applicant's First Name (Spelled out.) Joseph. Middle Name (If none, so state.) None. Last Name Solomon.

2. Employment applied for Brakeman.
3. Age 28 Date of Birth Nov. 20, 1880.
4. Nationality Irish Swede.
5. Where born Youngstown.
264 6. Name of wife, if living; if unmarried, so state Mrs. J. Solomon.
7. Name and address of parents, if living. Mr. & Mrs. August Solomon.
9. Give names and addresses of relatives wholly dependent upon you or to whose support you are contributing. Relationship Wife. Names Mrs. J. Solomon. Addresses Taylor Youngstown.
10. Whom do you wish notified in case of serious illness or injury? Name Mrs. J. Solomon. Address Taylor St. Youngstown.
1-. Do you use alcoholic drinks? No.
12. Have you ever been employed on any part of this system? No.
13. Have you ever been discharged from any situation? No.
14. Have you ever suffered any physical injury? No.
15. Have you any physical defect or ailment which might render you unfit for railroad service? No.
17. In order that the Erie Railroad Company may be fully informed as to my personal character and my qualifications for the position for which I have made application, I refer to each of my former employers, and request and authorize each of the said Companies for whom I have formerly worked, to give to the above-named Company all information they may be in possession of, whether shown by my personal record or otherwise, as to my personal character and also my qualifications for the position I have herein applied for, and the reason why I was discharged or
265 quit service, upon any inquiry that may be made of them, or either of them, by said Erie Railroad Company.

(Usual signature of applicant),
JOSEPH SOLOMON.

Witness:
E. S. EVANS.

Description of Applicant.

(To be filled out by the employing officer.)

Height, 5 feet 8½ inches; Weight, 170 pounds; Color of hair, Light; Color of eyes, Gray.
Give description of distinguishing marks or peculiarities. None.
I consider the above described applicant a suitable person to enter the Company's regular service. I desire to employ him as yard brakeman at Youngstown Ohio Station Mah. Division. Effective Jan'y 14 1900.

S. JAMES, *G. Y. M.*
Name and Title.

Approved.
F. J. MOSER,
Supt. Mahoning Division.

Approved.
G. W. GOULD,
Superintendent of Employment Bureau.
Oct. 20 1910.

266 (Book of Rules No. 8332.)

(Paragraphs 1 and 2 do not apply to Shop Employes.)

1. I hereby acknowledge receipt of a copy of the rules and regulations for the government of the Operating Department of said Railroad Company, and all amendments thereto, and also a copy of the current time table, and agree to familiarize myself with and observe all the same, and to keep advised of such amendments to said rules as may hereafter be made.

2. And I hereby acknowledge that I have been informed of the character of the employment I am about undertaking, and the duties connected therewith; that I have been notified that there are numerous Bridges, Buildings, Tunnels, Viaducts, Stock-Yard Chutes, Mail Cranes, Platforms and Coal Chutes and other obstructions now located and others may be constructed from time to time which will endanger my life and limb, and I agree in consideration of my employment to familiarize myself with the same and use due care for my safety without further notice from the Railroad Company, and I accept notice from said Railroad Company that few, if any, of the aforesaid buildings or obstructions will clear a man riding on top or side of a car, and that I am to use constant care for my safety in working about same. I also understand and agree that when it is necessary for me to go into the yards of other companies, I must exercise the same care about looking out for obstructions which may be close to track.

3. I also agree to examine and know for myself that the ways, works or machinery connected with or used in my employment are at all times in safe and proper condition and agree to give immediate notice in writing to some person superior to myself in the service of the Company of any defect in the condition of the ways,
267 works and machinery connected with or used in my employment, and if I continue to use such ways, works or machinery with a defect or defects therein, I agree to assume the risk of an accident as a risk incident to my employment, and hereby waive the provisions of any and all statutes or laws with respect thereto.

(Signed) JOSEPH SOLOMON.

Read over in my presence before signing:
Witness
E. S. EVANS,
Address, Youngstown Ohio.

STATE OF OHIO,
County of Mahoning:

Joseph Solomon, being duly sworn, says he is the applicant named above, and the person who subscribed the foregoing application; that he knows the contents of the said application, and that, as filled out and subscribed by him, it is true of his own knowledge. He further says that he makes and verifies the foregoing statement for the purpose of obtaining employment on the above-mentioned Railroad.

Applicant's Signature,
JOSEPH SOLOMON.

Subscribed and sworn to before me this 7th day of January 1910.
[SEAL.] R. CLYDE WHEELER,
Notary Public.

How and Where Previously Occupied.

Give continuous record for the last five (5) years in regular order.

To verify periods when idle, in own business, or working for relatives, give names, occupations and present post office addresses
268 of two responsible persons; when at school, its location and number, and names and addresses of teachers; to verify arrival in this country, names of navigation company, vessel and port of landing, and the date.

The Employing Office, to save subsequent correspondence, should see that the information is given intelligently and in as complete form as possible, verify by letter to accompany the application such records as he can, enclose Erie service certificate, if any held, copies of army and navy papers, passports, inspection cards and letters of recommendation, and an authority blank, form 2183, signed and witnessed, for each foreign railroad to which applicant refers, and explain any omission of these details.

Use one line only for each reference.

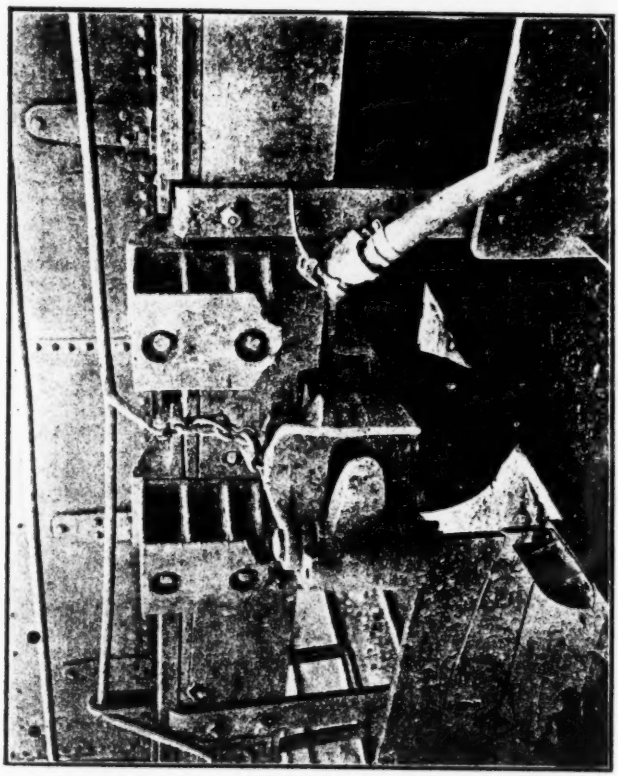
C. R. 6-3-10.

From—Month May; Day 23; Year 1906; To—Month May; Day 15; Year 1908; Occupation and check No. if any Fireman; What company or individual L. S. — M. S. Ry. At what point employed town and state Youngstown; Under whom—Name Jno. Brown; Title Foreman; Department Maintenance of way, shop, or transportation Ral. J. J. B. 6-8-10.

From—Month May; Day 20; Year 1909; To—Month Dec.; Day 20; Year 1909; Occupation and check No. if any Driver; What company or individual Chas. Harris; Town, state street address, (Unless a Railroad.) Youngstown; At what point employed town and state Ohio; Under whom—Name C. Harris; Title—Contractor.

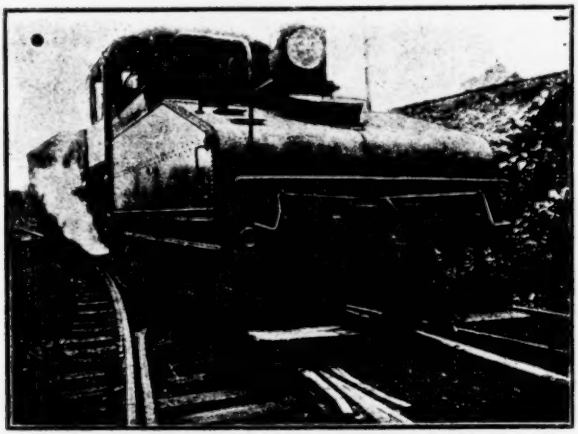
From—Month Dec.; Day 20; Year 1909; To—Month Jan.; Day 14; Year 1910.

(Here follow exhibits marked pages 269, 270, 271, 272.)

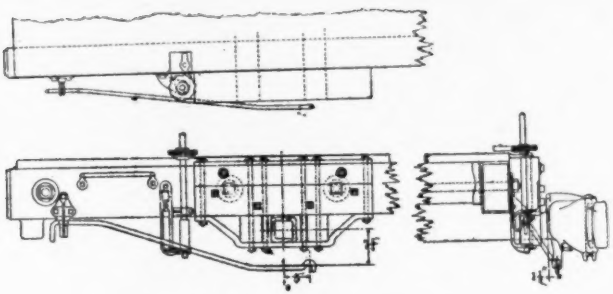


PLAINTIFF'S EXHIBIT A.

PLAINTIFF'S EXHIBIT B.



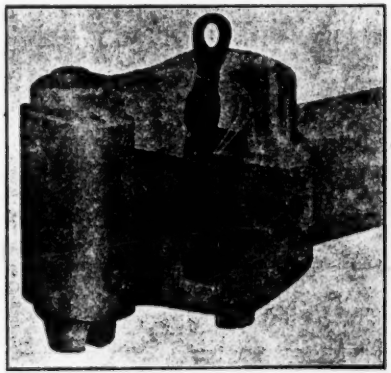
DEFENDANT'S EXHIBIT NO. 1.



DEFENDANT'S EXHIBIT 3.

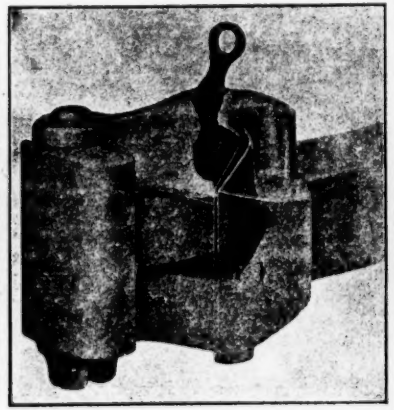
One form of recommended adjustments of uncoupling rod for use with tower side operating freight couplers.

DEFENDANT'S EXHIBIT 3.



CLIMAX COUPLER.
Lockset Position.

DEFENDANT'S EXHIBIT 3.



CLIMAX COUPLER.
Locked Position.

DEFENDANT'S EXHIBIT 3.

CLIMAX COUPLER.
Knuckle Thrown Position.

273 UNITED STATES OF AMERICA,
Supreme Court of Ohio, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court of Ohio, in the City of Columbus, Ohio, this 29th day of June, A. D. 1914.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

274 In the Supreme Court of the State of Ohio.

No. 13964.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
JOSEPH SOLOMON, Defendant in Error.

Petition for Writ of Error.

To the Honorable Hugh L. Nichols, Chief Justice of the Supreme Court of the State of Ohio:

The petition of the Erie Railroad Company, plaintiff in error above named, respectfully shows that heretofore, to-wit, on the 28th day of October, A. D. 1913, in the above entitled cause, final judgment was rendered against your petitioner by the Supreme Court of the State of Ohio, the same being the highest court of law and equity in said State of Ohio, wherein it was adjudged that the said defendant in error recover from your petitioner the sum of $6,500.00 with interest from the first day of January Term of Court, A. D. 1912, of the Common Pleas Court of Mahoning County, Ohio, to-wit; — day of January, 1912, and costs, and that said Supreme Court of the State of Ohio, did thereby affirm the judgment of said Court of Common Pleas of Mahoning County rendered in said action on the 27th day of March, 1912, and
275 the judgment of the Circuit Court of said Mahoning County, entered on the 8th day of November, A. D. 1912.

The petition of the said Joseph Solomon in said case was for the recovery of damages from your petitioner by reason of injuries to his left foot so that the same was amputated about three inches above the ankle thereof, and said petition further alleges that said injuries were caused by a defective and inoperative coupler upon a certain locomotive tender upon and about which the said Joseph Solomon was employed as a brakeman, and that said coupler

failed to couple automatically upon impact, and rendered it necessary for the said Joseph Solomon to go between said locomotive tender and the car to which he was attempting to couple the same to open and adjust said coupler. Said petition further alleges that while attempting to make said coupling, his said left foot, ankle and leg became caught between said locomotive coupler and car and were injured as aforesaid.

Upon the trial of said cause in said Court of Common Pleas of Mahoning County, Ohio, and upon the hearing of the same in said Circuit Court, in said County, and State, and in said Supreme Court of said State, your petitioner objected to an erroneous construction of the Safety Appliance Act of the State of Ohio (General Code 8950) and also to an erroneous construction of and the denial of a right and immunity claimed by your petitioner under the laws of the United States, to-wit; the Safety Appliance Act of March 2, 1893 (27 Stat. at L. 531 Chap. 196; U. S. Comp.
276 Stat. 1901, p. 3174), as amended by the Act of March 2, 1903 (32 Stat. at L. 943, Chap. 976 U. S. Comp. Stat. Supp. 1909, p. 1143).

Your petitioner further at the trial and hearing of said case in all of said courts, objected to the denial of a right, privilege and immunity claimed by it under the provisions of the 14th Amendment of the Constitution of the United States wherein it is provided that no state shall deprive any person of property without due process of law.

Your petitioner further says that in the final order and judgment and proceedings had prior thereto in this cause in said Supreme Court of the State of Ohio, as well as in said other courts, certain errors were committed to the prejudice of your petitioner, as above indicated, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, Erie Railroad Company petitions and prays that a writ of error from the Supreme Court of the United States may issue in its behalf to the Supreme Court of the State of Ohio for the correction of error so complained of, and that a transcript of record, proceedings and papers in this cause duly authenticated, may be sent to the Supreme Court of the United States.

ERIE RAILROAD COMPANY,
By HINE, KENNEDY & MANCHESTER,
Its Attorneys.

277 A writ of error as prayed for in the foregoing petition is hereby allowed this 11" day of May, 1914, the writ of error to operate as supersedeas, and the bond for that purpose is fixed at the sum of $15,000.00.

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of the State of Ohio.

Dated at Columbus, Ohio, this 11 day of May, A. D. 1914.

278 [Endorsed:] Case No. —. In the Supreme Court of the State of Ohio. No. 13964. Erie Railroad Company, Plaintiff in Error, vs. Joseph Solomon, Defendant in Error. Petition for Writ of Error. Filed Jun- 11, 1914. Supreme Court of Ohio. Frank E. McKean, Clerk. Hine, Kennedy & Manchester.

279 In the Supreme Court of the State of Ohio.

No. 13964.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
JOSEPH SOLOMON, Defendant in Error.

Assignment of Errors.

Now comes Erie Railroad Company, plaintiff in error, above named, and respectfully submits that in the record, proceedings, decision and final judgment of the Supreme Court of the State of Ohio in the above entitled matter, there is manifest error in this, to-wit:

1. The Court erred in overruling and denying the motion of plaintiff in error for judgment on special findings of fact made and returned by the jury in said cause.

2. The court erred in submitting to the jury the question whether there was an unreasonable amount of sideplay in the drawbar of said coupler, and in permitting the jury to find and determine whether there was an unreasonable amount of sideplay which would not be a proper compliance with the Safety Appliance Statutes.

280 3. That the court erred in holding and interpreting the provisions of the Safety Appliance Act of Ohio (Gen. Code of Ohio, Sec. 8950), to prohibit the use of a coupler with a lateral play of two and one half inches, it appearing in the record of this case that such amount of sideplay is necessary to the operation of a railroad, and the use of automatic couplers, and said court in so holding and interpreting said statute deprived plaintiff in error of its rights and property without due process at law.

4. That the court erred in holding and interpreting the provisions of the Safety Appliance Act of the United States of March 2, 1893 (27 Stat. at L. 531 Chap. 196; U. S. Comp. Stat. 1901, p. 3174), as amended by the Act of March 2, 1903 (32 Stat. at L. 943, Chap. 976 U. S. Comp. Stat. Supp. 1909, p. 1143), to prohibit the use of a coupler with a lateral play of two and one half inches, it appearing in the record of this case that such amount of sideplay is necessary to the operation of a railroad, and the use of automatic couplers, and said court in so holding and interpreting said statute deprived plaintiff in error of its rights and property without due process at law.

5. The court erred in denying the claim specially set up and

made by this plaintiff in error that under all the evidence in the case, and in the light of the special findings of fact returned by the jury, there was no negligence on the part of plain-
281 tiff in error, and that to sustain the verdict and the judgments of the lower courts would amount to the taking of property of this plaintiff in error without due process of law for the reason, as disclosed by the evidence, that the sideplay of two and one half inches in the coupler in question is necessary and is the standard recognized as used by railroads everywhere as well as by the Master Car Builders Association, and it is impracticable, if not altogether impossible to operate a railroad without such amount of sideplay.

6. The interpretation placed upon the Safety Appliance Act of the State of Ohio (Gen. Code of Ohio, Sec. 8950), is contrary to and in violation of the statutes and laws of the United States as to safety appliances on cars used on interstate railroads, and is contrary to the laws and the constitution of the United States in that it deprives said Erie Railroad Company of its property, without due process of law.

7. That the judgment of said court is repugnant to and in conflict with the laws of the United States, and especially that act of Congress of the United States commonly called The Safety Appliance Act of March 2, 1893 (27 Stat. at L. 531, Chap, 196; U. S. Comp. Stat. 1901, p. 3174), as amended by the Act of March 2, 1903 (32 Stat. at L. 943, Chap. 976 U. S. Comp. Stat. Supp. 1909, p. 1143.

8. That the judgment of said court is repugnant to and in conflict with Article 14 Section 1 of the Constitution of the
282 United States which declares "No state shall make or enforce laws which shall abridge the privilege or immunity of citizens of the United States, nor shall any state deprive any person of life, liberty or property without such process of law."

Wherefore, said Erie Railroad Company prays that the judgment and decision aforesaid may be reversed and altogether held for naught, and that it may be restored to all things which it has lost thereby.

ERIE RAILROAD COMPANY,
By HINE, KENNEDY & MANCHESTER,
Its Att'ys.

283 [Endorsed:] Case No. —. In the Supreme Court of the State of Ohio. No. 13964. Erie Railroad Company, Plaintiff in Error, vs. Joseph Solomon, Defendant in Error. Assignment of Errors. Filed Jun- 11 1914. Supreme Court of Ohio. Frank E. McKean, Clerk. Hine, Kennedy & Manchester.

284 In the Supreme Court of the State of Ohio.

No. 13964.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
JOSEPH SOLOMON, Defendant in Error.

Order Allowing Writ of Error.

The above entitled matter coming on to be heard upon the petition in error therein for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Ohio, and upon examination of said petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States, the question presented in said matter;

It is ordered;

That a writ of error be and is hereby allowed to this court from the Supreme Court of the United States, and that the bond presented by said petitioner be and the same is hereby approved.

HUGH L. NICHOLS,
Chief Justice.

Journal 26, page 497.

285 [Endorsed:] Case No. 13964. In the Supreme Court of the State of Ohio. Erie R. R. Co., Plaintiff in Error, vs. Joseph Solomon, Defendant in Error. Order Allowing Writ of Error. Filed Jun- 17, 1914. Supreme Court of Ohio. Frank E. McKean, Clerk. Hine, Kennedy & Manchester.

286 In the Supreme Court of the State of Ohio.

No. 13964.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
JOSEPH SOLOMON, Defendant in Error.

Entry of Certification.

On motion of Erie Railroad Company, plaintiff in error this court orders it to be certified and made a part of the record in this case, and of the judgment and entry of affirmance heretofore rendered and made a part hereof, that in the rendition of said judgment of affirmance, it became and was material to the case to determine whether a certain Federal Statute commonly called the Safety Appliance Act of March 2, 1893, (27 Stat. at L. 531, Chap. 198; U. S. Comp. Stat. 1901, p. 3174) as amended by the Act of March 2, 1903,

(32 Stat. at L. 943, Chap. 976 U. S. Comp. Stat. Supp. 1909, p. 1143) was applicable to the situation of the parties; and the court orders it to be certified further that said plaintiff in error claimed in brief and argument in this court that this court should decide and hold that the Safety Appliance Act of the State of Ohio, General Code of Ohio, section 8950, as construed by the lower courts and as construed by this court, is repugnant to the Constitution of the United States and particularly is repugnant to and in conflict with Article 14 section 1 of said Constitution of the United States, and that the decision was against the right, privilege and immunity claimed by said plaintiff in error.

This court further orders it to be certified that this court is the highest court of law and equity in the state of Ohio, in which a decision of this case can be had.

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of the State of Ohio.

Journal 26–page 507.

287 [Endorsed:] Case No. 13964. In the Supreme Court of the State of Ohio. Erie Railroad Company, Plaintiff in Error, vs. Joseph Solomon, Defendant in Error. Entry of Certification. Filed Jun- 16, 1914. Supreme Court of Ohio. Frank E. McKean, Clerk. Hine, Kennedy & Manchester.

288 In the Supreme Court of the State of Ohio.

No. 13964.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
JOSEPH SOLOMON, Defendant in Error.

Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Ohio.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Ohio, Greeting:

Because in the Record and proceedings, as also in the rendition of the judgment, of the plea which is in the said Supreme Court of the State of Ohio, by you or some of you, being the highest court of law or equity of said State in which a decision could be had in a suit between Erie Railroad Company and Joseph Solomon, wherein there was denied a right, privilege and immunity claimed by said Erie Railroad Company under the provisions of the Constitution and laws of the United States and manifest error hath happened, to the great damage of the said Erie Railroad Company, Plaintiff in Error, we being willing that error, if any hath been, should be duly corrected,

and full and speedy justice done to the parties aforesaid, and in their behalf, do command you, if judgment be herein given, that under your seal, distinctly and openly, you sign the record and proceedings aforesaid, of all things concerning same, to the Supreme Court of the United States, together with this writ, so that you have the same
289 at Washington City on the 11th day of July 1914, in the said Supreme Court of the United States, to be then and there held, that, the record and proceedings aforesaid, being inspected, the said Supreme Court of the United States may cause further to be done therein, to correct that error, *which*, of *a writ* and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 11" day of June, A. D. 1914.

[Seal United States District Court, Southern Dis. Ohio.]

B. E. DILLEY,
Clerk of the United States District Court of the Southern District of Ohio, Eastern Division.

Allowed by:
HUGH L. NICHOLS,
Chief Justice of the Supreme Court of the State of Ohio.

290 [Endorsed:] #13964. In the Supreme Court of the State of Ohio. Erie Railroad Co., Pl'f in Error, vs. Joseph Solomon, Def't in Error. Writ of Error. Filed Jun- 11, 1914. Supreme Court of Ohio. Frank E. McKean, Clerk.

291 In the Supreme Court of the State of Ohio.

No. 13964.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
JOSEPH SOLOMON, Defendant in Error.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

To Joseph Solomon, Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington City, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the State of Ohio, wherein Erie Railroad Company is Plaintiff in Error and you are defendant

in error, to show cause why, if any there be, *of* the Judgment rendered herein against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in their behalf.

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of the State of Ohio.

Dated 11th day of June, 1914.

Copy of the above citation received this 12th day of June, 1914, at Youngstown, Ohio, and the appearance of the defendant in error is hereby entered.

JOSEPH SOLOMON,
By EMIL J. ANDERSON,
BLAKE C. COOK,
J. G. MATHEWS, AND
C. B. COOK,
His Attorneys.

292 [Endorsed:] 13964. Citation & Entry of Appearances. Filed Jun- 26, 1914. Supreme Court of Ohio. Frank E. McKean, Clerk.

293 In the Supreme Court of Ohio.

No. 13964.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
JOSEPH SOLOMON, Defendant in Error.

Error to the Circuit Court of Mahoning County.

Bond.

Know all men by these Presents, that we, Erie Railroad Company, as principal, and National Surety Company, as surety, are held and firmly bound unto Joseph Solomon in the sum of Fifteen Thousand Dollars ($15,000.00) to be paid to the said obligee, his heirs, representatives and assigns, *and* the payment of which well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Witness Our Corporate Names hereto this 11th day of June, A. D. 1914.

Whereas, the above named plaintiff in error, Erie Railroad Company, has prosecuted a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Ohio.

Now, Therefore, the condition of this obligation is such that if the above named plaintiff in error shall prosecute its said writ of error

to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void, otherwise to remain in full force and effect.

ERIE RAILROAD COMPANY,
[SEAL.] By J. B. DICKSON,
Ass't General Manager.
NATIONAL SURETY COMPANY,
By LOUIS LIEBMAN, *Attorney in Fact.*

294 On this 26th day of June, A. D. 1914, the above bond having been presented to me for approval, and having examined the same and finding it to be in conformity to law, and sufficient in all respects, I hereby approve the same.

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of the State of Ohio.

294½ STATE OF OHIO,
Mahoning County, ss:

Before me, the undersigned authority, in and for said County and State, personally came Louis Liebman, and acknowledged that he affixed the name of The National Surety Company to the above and foregoing bond, being thereunto duly authorized, as its agent, and that the same is his free act and deed, as such agent, and the free act and deed of said corporation.

Witness my hand and official seal at Youngstown, Ohio, this 12th day of June, A. D. 1914.

[SEAL.] JOHN SCHLARB,
Notary Public.

STATE OF OHIO,
Cuyahoga County, ss:

Before me, the undersigned authority, a Notary Public in and for said County and State, personally appeared J. B. Dickson, Assistant General Manager of Erie Railroad Company, and acknowledged that he did affix the corporate name of said Erie Railroad Company to the above and foregoing bond, being thereunto duly authorized, and that the same is his free act and deed as Assistant General Manager, and the free act and deed of said corporation.

Witness my hand and Notarial seal at Cleveland, Ohio, this 13th day of June, A. D. 1914.

[SEAL.] C. N. VAN WORMER,
Notary Public.

295 Supreme Court of Ohio. January Term, 1912. #13964.

Attorneys:

Hine, Kennedy & Manchester, Youngstown.
Anderson, Cook & Mathews, Youngstown.

Title:

ERIE RAILROAD COMPANY
vs.
JOSEPH SOLOMON.

Action:

Error to the Circuit Court of Mahoning County.

O. A.

Docket Entries.

1912.

Dec. 26. Petition in Error, Waiver of Summons, Circuit Court Transcript, Original Papers and Bill of Exceptions filed.
" " Papers sent Toledo Legal Brief & Record Co. by express.

1913.

Jan. 25. Parers returned.
" " Printed Record filed. 1/28/1913, Proof of Service filed.
Feb. 4. Motion by defendant to advance, Affidavit and Notice filed.
" 5. Request for oral argument filed by Hine, Kennedy & Manchester.
" 11. Motion by defendant to advance allowed. J. 25-586.
" 24. Printer's Receipted Bill filed.
Apr. 10. Motion by plaintiff for extension of time to file brief to April 24, 1913, and Consent filed.
" 15. Motion by plaintiff to extend time for brief to April 24, 1913, allowed by consent. J. 26-33.
" 23. Plaintiff's Printed Brief filed. 5/12/1913, Proof of Service filed.
May 20. Defendant's Printed Brief and Proof of Service filed.
Oct. 28. Judgment Affirmed. J. 26-228.
Nov. 3. Mandate Issued.
" " Original Papers sent to Clerk.

1914.

June 11. Petition for Writ of Error and Order allowing Writ, Assignment of Errors, and Writ of Error, filed.
" 26. Citation and entry of appearance of defendant in error filed.
" " Bond in sum of $15,000 signed by plaintiff in error as principal and National Surety Co., as surety, filed.
" " Copy of writ of error and citation lodged in Clerk's office.

Transcript of Journal Entries.

1913.

Feb'y 11th. Motion by defendant to advance cause No. 13964, on the General Docket.

"It is ordered by the Court that this motion be, and the same hereby is, allowed." Journal 25, p. 586.

April 15th. Motion by the plaintiff to extend time for brief to April 24, 1913, in cause No. 13964, on the General Docket.

"It is ordered by the Court that this motion be, and the same hereby is, allowed by consent." Journal 26, p. 33.

Oct. 28th. "This day this cause came on to be heard upon the transcript of the record of the Circuit Court of Mahoning County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the Circuit Court be, and the same is hereby, affirmed; and it appearing to the Court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein. It is further ordered that the defendant in error recover from the plaintiff in error his costs herein expended, taxed at $—. Ordered, that a special mandate be sent to the Common Pleas Court of Mahoning County, to carry this judgment into execution. Ordered, that a copy of this entry be certified to the Clerk of the Court of Appeals of Mahoning County, 'for entry.'"

296

Supreme Court of Ohio.

No. 13964.

ERIE RAILROAD COMPANY,
vs.
JOSEPH SOLOMON.

Error to the Circuit Court of Mahoning County.

STATE OF OHIO,
City of Columbus, ss:

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio do hereby certify that the foregoing petition for writ of error, assignment of errors, order allowing writ of error, entry of certification — writ of error, citation and entry of appearance thereon are the original papers filed in this Court in the above entitled case; that the foregoing copy of the bond is a true and correct copy of the original bond filed in said cause, and now lodged in my office; that the printed copy of the record attached hereto is a true and cor-

rect copy of the printed record filed in said cause and used by the Supreme Court of Ohio in the consideration of said cause; that the foregoing transcript of docket and journal entries is truly taken and correctly copied from the records of said Court; that a copy of the writ of error and citation has been lodged in my office; and that no opinion was rendered by the court in said cause.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court of Ohio this 29th day of June, A. D. 1914.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

Endorsed on cover: File No. 24,303. Ohio Supreme Court, Term No. 559. Erie Railroad Company, plaintiff in error, vs. Joseph Solomon. Filed July 8, 1914. File No. 24,303.

4

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 559.

ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JOSEPH SOLOMON, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF OHIO.

BRIEF OF PLAINTIFF IN ERROR OPPOSING MOTION OF DEFENDANT IN ERROR TO DISMISS, AFFIRM, OR TRANSFER TO SUMMARY DOCKET.

C. D. HINE,
Of Youngstown, Ohio, Attorney of Record for Plaintiff in Error.

(24,303)

INDEX.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 559.

ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JOSEPH SOLOMON, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF OHIO.

BRIEF OF PLAINTIFF IN ERROR OPPOSING MOTION OF DEFENDANT IN ERROR TO DISMISS, AFFIRM, OR TRANSFER TO SUMMARY DOCKET.

References.

To substantiate statements of fact, appropriate references are made to the printed record in the Supreme Court of Ohio, a copy of which is made a part of the transcript filed herein.

I.

Facts.

Defendant in error, a brakeman employed by plaintiff in error at Youngstown, Ohio, brought this action in the Common Pleas Court of Mahoning County, Ohio, to recover damages for the loss of his left foot from injuries sustained in an attempt to kick over the drawbar of a coupler of a moving locomotive preparatory to coupling to a standing car.

Plaintiff's claim of negligence is that the coupler on the locomotive was defective, as set up in his first amended petition as follows:

> "Plaintiff says defendant company on said date caused and permitted said locomotive engine and tender number seventy-five (75) to be hauled and used on said switch track; that the coupler on the rear end of said tender—instead of coupling with other cars automatically upon impact, without the necessity of employees of defendant company going between the ends of said tender and cars—would not so couple upon impact with the couplers of other cars, but was defective and inoperative in this, to wit; that the drawbar of said coupler had such a degree of side play that when it was pushed over to either side of the housing and hangers in which it was fastened it would not squarely meet the couplers of other cars, and would not couple with other cars automatically upon impact; so that it became and was necessary for employees to go in between the ends of said tender and cars to adjust or swing said drawbar into position to couple with such other cars; and that the knuckle, knuckle pin and lock of said coupler were so rusted, worn, and battered that instead of operating freely in response to the cutting lever, operated from the side of said tender, they would bind to such an extent that said knuckle would not open sufficiently to couple with other cars automatically upon impact, but rendered it necessary for

employees to go in between said tender and cars to open said knuckle before such coupling could be made."

(Record, pp. 9 and 10.)

The following interrogatories were submitted by the plaintiff below and answers return by the jury:

"At the time of the accident to plaintiff was the drawbar in such condition as necessitated plaintiff to line up the drawbar before a coupling could be made?

"Yes.

"F. W. BANKS, *Foreman.*

"At the time of the accident to plaintiff, could the plaintiff open the knuckle solely by reason of the cutting lever?

"Yes.

"F. W. BANKS, *Foreman.*

"At the time of the accident to plaintiff, was it necessary for plaintiff to open the knuckle by hand?

"No.

"F. W. BANKS, *Foreman.*"

(Record, pp. 18 and 19.)

While the particular movement in which plaintiff in error was injured relates to intrastate traffic, the railway of plaintiff in error is a highway of interstate commerce, and the locomotive in question was used in moving traffic thereon.

II.

Points and Authorities.

The motion of defendant in error should be denied, because Federal questions exist, and were properly raised so that this court has jurisdiction.

First. A right, privilege, and immunity from liability was asserted and denied under the provisions of the Safety Appliance Act of the United States of March 2, 1893, 27 Stat. at L., 531, chap. 196; U. S. Com. Stat., 1901, page 3174, as amended by the act of March 2, 1903, 32 Stat. at L., 943, chap. 976; U. S. Com. Stat., Supp. 1909, page 1143.

16 Cyc., 861, and cases cited.

Southern R. Co. *vs.* United States, 222 U. S., 20; 32 Sup. Ct., 2.

Second. A right, privilege, and immunity from liability was asserted and denied under article 14, section 1, of the Constitution of the United States which declares:

> "No State shall make or enforce laws which shall abridge the privilege or immunity of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law."

Third. These Federal questions were properly raised.

Rector *vs.* City Deposit Bank, 200 U. S., 405, 412.

Chambers *vs.* Baltimore & O. R. Co., 207 U. S., 142; 52 L. Ed., 143.

San Jose Land & Water Co. *vs.* San Jose Ranch Co., 189 U. S., 177; 47 L. Ed., 765.

Haire *vs.* Rice, 204 U. S., 291; 51 L. Ed., 490.

Atchison, Topeka, etc., R. Co. *vs.* Sowers, 213 U. S., 55, 63; 53 L. Ed., 695.

Carlson *vs.* St. of Washington, 234 U. S., 103; 34 Sup. Ct. Rep., 717.

Arkansas Southern Ry. Co. *vs.* German Bank, 207 U. S., 270; 52 L. Ed., 201.

Furman *vs.* Nichols, 8 Wall., 44; 19 L. Ed., 370.

Crapo *vs.* Kelly, 16 Wall., 610; 21 L. Ed., 430.

Andrews *vs.* Andrews, 188 U. S., 14; 47 L. Ed., 366.

Pennywit *vs.* Eaton, 15 Wall., 380; 21 L. Ed., 72.

L. & N. R. Co. *vs.* Higdon, 234 U. S., 592; 34 Sup. Ct. Rep., 948.

Mo. Pac. Ry. Co. *vs.* Larabee, 234 U. S., 459; 34 Sup. Ct. Rep., 979.

Western Turf Ass. *vs.* Greenburg, 204 U. S., 359.

Illinois Cent. R. Co. *vs.* Chicago, 176 U. S., 646; 44 L. Ed., 622.

Blythe *vs.* Hinckley, 180 U. S., 333; 45 L. Ed., 557.

Meyer *vs.* Richmond, 172 U. S., 82; 43 L. Ed., 374.

East Tenn., etc., Ry. Co. *vs.* Frazier, 139 U. S., 288; 35 L. Ed., 196.

Home for Incurables *vs.* New York, 187 U. S., 155; 47 L. Ed., 117.

Eau Claire Nat. Bank *vs.* Jackman, 204 U. S., 522; 51 L. Ed., 596.

Hammond *vs.* Whittredge, 204 U. S., 538; 51 L. Ed., 606.

Nutt *vs.* Knut, 200 U. S., 12; 50 L. Ed., 348.

McCormick *vs.* Market Nat. Bank, 165 U. S., 538; 41 L. Ed., 817.

Rector *vs.* City Deposit Bank, 200 U. S., 405; 50 L. Ed., 527.

California Nat. Bank *vs.* Kennedy, 167 U. S., 362; 42 L. Ed., 198.

Illinois Central R. Co. *vs.* McKendree, 203 U. S., 514; 51 L. Ed., 298.

St. Louis & I. M. R. Co. *vs.* Taylor, 210 U. S., 281, 293; 52 L. Ed., 1061.

Southern Ry. Co. *vs.* Crockett, 234 U. S., 725; 34 Sup. Ct. Rep., 897.

N. Carolina R. Co. *vs.* Zachary, 232 U. S., 248; 34 Sup. Ct. Rep., 305.

Miedreich *vs.* Lauenstein, 232 U. S., 236; 34 Sup. Ct. Rep., 309.

Grannis *vs.* Ordeau, 234 U. S., 385; 34 Sup. Ct. Rep., 779.

International Harvester Co. *vs.* Missouri, 234 U. S., 199; 34 Sup. Ct. Rep., 859.

Louisville & N. R. Co. *vs.* Higdon, 234 U. S., 592; 34 Sup. Ct. Rep., 949.

III.

ARGUMENT.

First. A right, privilege, and immunity from liability was asserted and denied under the provisions of the Safety Appliance Act of the United States of March 2, 1893, 27 Stat. at L., 531, chap. 196; U. S. Com. Stat., page 3174, as amended by the act of March 2, 1903, 32 Stat. at L., 943, chap 976; U. S. Com. Stat., Supp. 1909, page 1143.

This court has jurisdiction because immunity from liability was claimed by the plaintiff in error on the ground that there was no negligence under the Federal Safety Appliance Act.

A. The defendant in error was employed upon a locomotive operating upon an interstate highway.

(*a*) The allegation of the first amended petition is that plaintiff in error "was a railroad corporation, duly created, organized, and existing under and by virtue of the laws of New York, and engaged in maintaining a line of railway, passing through the city of Youngstown, Mahoning County, Ohio, where it had a certain main and switch tracks, and that one of said switch tracks, known as number six (6) track, was located near the plant of Carnegie Steel Company" (Record, p. 9).

It was on No. 6 track where the accident occurred.

(*b*) Being a corporation of New York, it could not be operating a railroad in Ohio except it passed through these two and intervening States.

(*c*) The engine was subject to Federal inspection (Record, p. 189).

(*d*) It appears from Solomon's application for employment that plaintiff in error is an interstate railroad (Record, p. 263).

(*e*) The court will take judicial knowledge of the location and operation of railroads, and that the line of railway of plaintiff in error is an interstate highway. 16 Cyc., 861, and cases cited.

B. The negligence charged is a defective coupler.

C. The coupler being used by an interstate carrier on an interstate highway, its sufficiency is determined solely by the Federal statute. It is not necessary that the employee be engaged in interstate traffic, as under the Federal Employers' Liability Act.

> "The act of March 2, 1903 (32 Stat. at L., 943, chap. 976; U. S. Comp. Stat., Supp. 1909, p. 1143), amended the earlier one and enlarged its scope by declaring, *inter alia*, that its provisions and requirements should 'apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith.' * * * For these reasons it must be held that the original act, as enlarged by the amendatory one, is intended to embrace all locomotives, cars, and similar vehicles used on any railroad which is a highway of interstate commerce.
>
> "We come, then, to the question whether these acts are within the power of Congress under the commerce clause of the Constitution, considering that they are not confined to vehicles used in moving interstate traffic, but embrace vehicles used in moving intrastate traffic. * * * These practical considerations make it plain, as we think, that the questions before stated must be answered in the affirmative."
>
> Southern R. Co. *vs.* United States, 222 U. S., 20; 32 Sup. Ct., 2.

Second. A right, privilege, and immunity from liability was asserted and denied under article 14, section 1, of the Constitution of the United States, which declares, "No State shall make or enforce laws which shall abridge the privilege or immunity of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law."

The judgment of the Supreme Court of Ohio operates to deprive plaintiff in error of its property without due process of law, because it necessarily inhibits the use of an automatic coupler with a side play of 2½ inches, which the record shows is necessary to the operation of a railroad. This strained and unwarranted interpretation of the law amounts to a prohibition of the operation of the railway of plaintiff in error.

A. From the interrogatories above quoted, it appears the jury found the coupler in perfect condition, excepting that it was necessary "to line up the drawbar." In the other respects complained of the jury found the coupler perfect. The judgment therefore rests upon the single fact that there was 2½ inches of side play at the hanger.

B. The evidence all agrees that the amount of side play was 2½ inches.

(*a*) This is the standard in use everywhere (Record, pp. 225, 190).

(*b*) It is adopted as standard by the Master Car Builders Association (Record, pp. 178, 222).

(*c*) There is no dispute in the record that a railroad could not be operated without such amount of side play in the coupler.

(*d*) The effect of the judgment, therefore, is to prohibit the operation of railroads everywhere which would be unreasonable and unwarranted, and would amount to the confiscation of the property of plaintiff in error and the prohibition of the moving of interstate commerce.

C. The coupler was new. It had been on the locomotive less than three months (Record, pp. 174, 194). The side play was the same as when the coupler was applied. It had not been increased by wear.

Third. These Federal questions were properly raised.

A. The right to operate its railroad with the coupler in question and a privilege and immunity from liability on account thereof were claimed and denied in the highest court in the State of Ohio, and are claimed in this court by plaintiff in error under both the provisions of the Federal Constitution above referred to and the Federal Safety Appliance Act.

B. This appears from the certificate of the Chief Justice of the Supreme Court of Ohio, a copy of which is printed and hereto attached.

Rector *vs.* City Deposit Bank, 200 U. S., 405, 412.

C. It appears from the record in the Supreme Court of Ohio, a transcript of which is filed in this court, that these Federal questions were in issue and were decided against the claim of Federal right made by plaintiff in error, and the decision of these questions was essential to the judgment rendered.

(*a*) The questions were properly raised according to the State practice.

(1) By motion to direct a verdict (*aa*) at the close of plaintiff's evidence (Record, p. 77); (*bb*) at the close of all the evidence (Record, p. 241); (*cc*) after argument by written request (Record, p. 244).

(2) By exception to the charge of the court (Record, p. 261).

(3) By motion for judgment on special findings of fact (Record, p. 14).

(4) By motion for a new trial (Record, p. 14).

(*b*) They were therefore considered and decided by the Supreme Court of Ohio as certified by the Chief Justice.

(*c*) They were necessarily decided by that court adversely to plaintiff in error by entering a judgment penalizing the use of a coupler claimed sufficient under Federal law.

Chambers *vs.* Baltimore & O. R. Co., 207 U. S., 142; 52 L. Ed., 143.

San Jose Land & Water Co. *vs.* San Jose Ranch Co., 189 U. S., 177; 47 L. Ed., 765.

Haire *vs.* Rice, 204 U. S., 291; 51 L. Ed., 490.

Atchison, Topeka, etc., R. Co. *vs.* Sowers, 213 U. S., 55, 63; 53 L. Ed., 695.

D. The judgment as rendered could not have been given without deciding these Federal questions.

Carlson *vs.* St. of Washington, 234 U. S., 103; 34 Sup. Ct. Rep., 717.

E. It is immaterial to the jurisdiciton of this court whether the State court rightly or wrongly decided the Federal questions.

Arkansas Southern Ry. Co. *vs.* German Bank, 207 U. S., 270; 52 L. Ed., 201.

Furman *vs.* Nichols, 8 Wall., 44; 19 L. Ed., 370.
Crapo *vs.* Kelly, 16 Wall., 610; 21 L. Ed., 430.
Andrews *vs.* Andrews, 188 U. S., 14; 47 L. Ed., 366.
Pennywit *vs.* Eaton, 15 Wall., 380; 21 L. Ed., 72.
L. & N. R. Co. *vs.* Higdon, 234 U. S., 592; 34 Sup. Ct. Rep., 948.
Mo. Pac. Ry. Co. *vs.* Larabee, 234 U. S., 459; 34 Sup. Ct. Rep., 979.

F. If the statute of Ohio applies, as claimed by defendant in error in his motion, still the case presents a Federal question on the ground that due process of law was denied, as plaintiff in error challenges the constitutionality of the State statute as an abridgment of its rights, privileges, and immunities, and as depriving it of its property without due process of law in view of the interpretation given it by the Supreme Court of Ohio, which interpretation penalizes an interstate carrier, although it used the best automatic coupler it could possibly obtain.

Western Turf Ass. *vs.* Greenburg, 204 U. S., 359.

G. It is only necessary to show that the Federal question is set up in good faith and is not wholly destitute of merit.

Illinois Cent. R. Co. *vs.* Chicago, 176 U. S., 646; 44 L. Ed., 622.
Blythe *vs.* Hinckley, 180 U. S., 333; 45 L. Ed., 557.

H. It is sufficient if asserted at some point in the proceedings before the State court.

Meyer *vs.* Richmond, 172 U. S., 82; 43 L. Ed., 374.
East Tenn., etc., Ry. Co. *vs.* Frazier, 139 U. S., 288; 35 L. Ed., 196.

I. It is sufficient if the opinion of the State court shows it decided the Federal question presented to it in some way.

Chambers *vs.* Baltimore & O. R. Co., 207 U. S., 142; 52 L. Ed., 143.

Home for Incurables *vs.* New York, 187 U. S., 155; 47 L. Ed., 117.

Atchison, T. & S. Fe R. Co. *vs.* Sowers, 213 U. S., 55, 63; 53 L. Ed., 695.

San Jose Land & Water Co. *vs.* San Jose Ranch Co., 189 U. S., 177; 47 L. Ed., 765.

Haire *vs.* Rice, 204 U. S., 291; 51 L. Ed., 490.

Eau Claire Nat. Bank *vs.* Jackman, 204 U. S., 522; 51 L. Ed., 596.

J. It is sufficient that the Federal question was fully considered in the opinion of the Supreme Court of Ohio and ruled against the plaintiff in error. That such was done appears from the certificate of the Chief Justice of the Supreme Court of Ohio.

San Jose Land & Water Co. *vs.* San Jose Ranch Co., 189 U. S., 177, 180; 47 L. Ed., 765, and cases there cited.

Chambers *vs.* Baltimore & O. R. Co., 207 U. S., 142; 52 L. Ed., 143.

Atchison, T. & S. F. R. Co. *vs.* Sowers, 213 U. S., 55, 63; 53 L. Ed., 695.

K. A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States asserts a right and immunity under such statutes.

Eau Claire Nat. Bank *vs.* Jackman, 204 U. S., 522; 51 L. Ed., 598.

Hammond *vs.* Whittredge, 204 U. S., 538; 51 L. Ed., 606.

San Jose Land & Water Co. *vs.* San Jose Ranch Co., 189 U. S., 177; 47 L. Ed., 765.

Nutt *vs.* Knut, 200 U. S., 12; 50 L. Ed., 348.

McCormick *vs.* Market Nat. Bank, 165 U. S., 538; 41 L. Ed., 817.

Rector *vs.* City Deposit Bank, 200 U. S., 405; 50 L. Ed., 527.

California Nat. Bank *vs.* Kennedy, 167 U. S., 362; 42 L. Ed., 198.

Illinois Central R. Co. *vs.* McKendree, 203 U. S., 514; 51 L. Ed., 298.

St. Louis & I. M. R. Co. *vs.* Taylor, 210 U. S., 281, 293; 52 L. Ed., 1061.

Also Southern Ry. Co. *vs.* Crockett, 234 U. S., 725; 34 Sup. Ct. Rep., 897.

L. If the defendant expressly claimed immunity and the highest court in the State denied it, it is sufficient, whether raised in the trial court according to local practice or not.

N. Carolina R. Co. *vs.* Zachary, 232 U. S., 248; 34 Sup. Ct. Rep., 305.

Miedreich *vs.* Lauenstein, 232 U. S., 236; 34 Sup. Ct. Rep., 309.

Carlson *vs.* St. of Washington, 234 U. S., 103; 34 Sup. Ct. Rep., 717.

Grannis *vs.* Ordeau, 234 U. S., 385; 34 Sup. Ct. Rep., 779.

International Harvester Co. *vs.* Missouri, 234 U. S., 199; 34 Sup. Ct. Rep., 859.

Louisville & M. R. Co. *vs.* Higdon, 234 U. S., 592; 34 Sup. Ct. Rep., 949.

Conclusion.

From the foregoing it appears that the motion should be dismissed, not only for the reason that it is without foundation, but also because to determine the issue it raises necessarily involves the consideration of the merits of the case. It is contended that the questions upon which the decision in this cause depend are so frivolous as to need little or no argument, and it is manifest that the writ of error was taken

for delay only. This we deny. Can it be said that this error proceeding is frivolous and for delay only when the effect of the judgment below is to make unlawful the operation of every locomotive, car, and other vehicle of interstate commerce upon the railway of plaintiff in error; when to comply with the spirit of the judgment below would necessitate the instant stoppage of the operation of not only the railway of plaintiff in error, but of every other railway in the country? If the State courts can, under the guise of regulation, claim exclusive jurisdiction and enforce a judgment of this character, then they have by the same authority power to destroy interstate commerce.

Congress, by legislation covering the entire field to the exclusion of State regulations, has prescribed that automatic couplers shall be used on interstate highways. What is a sufficient coupler may in some instances be a question of fact, but where, as in this case, the facts are not in dispute, it is a question of law for the court. And the law which controls is the supreme law of the land as pronounced by this court. Otherwise Federal regulation of interstate commerce is a fiction. It is not consonant with our ideas of the supremacy of that law that a coupler sufficient under its requirements may be held insufficient under the law of a State through which the interstate carrier operates. Neither is it consonant with our ideas of the efficacy of that law that the whim of a jury should be permitted to condemn as insufficient that which universal railroad usage and the experience, knowledge, and skill of those practiced and trained in that wonderfully complex and intricate business of great magnitude have pronounced not only sufficient, but the very best procurable at the present stage of development of the art.

Respectfully submitted,

C. D. HINE,
Of Youngstown, Ohio,
Attorney of Record for Plaintiff in Error.

APPENDIX.

IN THE SUPREME COURT OF THE STATE OF OHIO.

No. 13964.

ERIE RAILROAD COMPANY, *Plaintiff in Error,*
vs.
JOSEPH SOLOMON, *Defendant in Error.*

Entry of Certification.

On motion of Erie Railroad Company, plaintiff in error, this court orders it to be certified and made a part of the record in this case, and of the judgment and entry of affirmance heretofore rendered and made a part hereof, that in the rendition of said judgment of affirmance it became and was material to the case to determine whether a certain Federal statute commonly called the Safety Appliance Act of March 2, 1893 (27 Stat. at L., 531; chap. 198 U. S. Comp. Stat., 1901, p. 3174), as amended by the act of March 2, 1903 (32 Stat. at L., 943; chap. 976 U. S. Comp. Stat. Supp., 1909, p. 1143), was applicable to the situation of the parties, and the court orders it to be certified further that said plaintiff in error claimed in brief and argument in this court that this court should decide and hold that the Safety Appliance Act of the State of Ohio, General Code of Ohio, section 8950, as construed by the lower courts and as construed by this court, is repugnant to the Constitution of the United States, and particularly is repugnant to and in conflict with article 14, section 1, of said Constitution of the United States, and that the decision was against the right, privilege, and immunity claimed by said plaintiff in error.

This court further orders it to be certified that this court is the highest court of law and equity in the State of Ohio in which a decision of this case can be had.

(Signed) HUGH L. NICHOLS,
Chief Justice of the Supreme Court of the State of Ohio.

"SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Act March 2, 1893, c. 196, § 2, 27 Stat., 531.

Act March 2, 1903, c. 976.

"An act to amend an act entitled 'An Act to Promote the Safety of Employees and Travelers upon Railroads by Compelling Common Carriers Engaged in Interstate Commerce to Equip Their Cars with Automatic Couplers and Continuous Brakes, and Their Locomotives with Driving-wheel Brakes, and for Other Purposes,' approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six" (32 Stat., 943).

Provisions of Act Requiring Driving-wheel Brakes, etc., Extended; Exceptions.

"*Be it enacted, &c.*, That the provisions and requirements of the act entitled 'An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes,' approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hun-

dred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make or type; and the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons, and the height of draw-bars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars, and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six, or which are used upon street railways."

Act March 2, 1903, c. 976, § 1, 32 Stat., 943.

This section extends the provisions of act March 2, 1893, c. 196, as amended by act April 1, 1896, c. 87, set forth in Comp. St. 1901, pp. 3174-3176, to common carriers by railroads in the Territories and the District of Columbia, and to trains, locomotives, etc., as set forth in the text. Section 6 of said act, mentioned in this section, excepts from the other provisions of the act trains composed of four-wheel cars, trains composed of eight-wheel standard logging cars where the height of such car from the top of rail to center of coupling does not exceed 25 inches, and locomotives used in hauling such trains when such cars or locomotives are exclusively used for the transportation of logs, and is set forth in Comp. St. 1901, p. 3175.

Provisions supplementary to said act March 2, 1893, c. 196, and other "Safety Appliance Acts," including this act, are contained in act April 14, 1910, c. 160, set forth below.

Received copy of the foregoing brief of plaintiff in error opposing motion of defendant in error to dismiss, affirm, or transfer to summary docket, and appendix thereto attached, this 30th day of November, A. D. 1914.

EMIL J. ANDERSON,
Of Youngstown, Ohio,
Attorney of Record for Defendant in Error.

[Endorsed:] Case No. 559. In the Supreme Court of the United States. 559/24,303. Erie R. R. Co., plaintiff in error, vs. Joseph Solomon, defendant in error. Brief of plaintiff in error opposing motion of defendant in error to dismiss, affirm, or transfer to summary docket. Hine, Kennedy & Manchester.

SUBJECT INDEX.

CASES CITED.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 559.

ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JOSEPH SOLOMON, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF OHIO.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

History of Litigation.

Joseph Solomon brought this action in the Common Pleas Court of Mahoning County, Ohio, against Erie Railroad Company as defendant. In that court he recovered a verdict and judgment of $6,500, which was affirmed by the Circuit

Court and later by the Supreme Court of Ohio, the Supreme Court being the highest court of law and equity in the State of Ohio in which a decision in this case could be had. The case is here on a writ of error to the Supreme Court of Ohio allowed by the Chief Justice of the Supreme Court of Ohio.

Issues.

In his petition plaintiff asked damages for the loss of his foot while employed by Erie Railroad Company at Youngstown, Ohio, as a brakeman. In his first amended petition he states his claim as follows:

> "Plaintiff says: Defendant company on said date caused and permitted said locomotive engine and tender number seventy-five (75) to be hauled and used on said switch track; that the coupler on the rear end of said tender—instead of coupling with other oars automatically upon impact, without the necessity of employees of defendant company going between the ends of said tender and cars—would not so couple upon impact with the couplers of other cars, but was defective and inoperative in this, to wit: that the draw bar of said coupler had such a degree of side play that when it was pushed over to either side of the housing and hangers in which it was fastened it would not squarely meet the couplers of other cars, and would not couple with other cars automatically upon impact,—so that it became and was necessary for employees to go in between the ends of said tender and cars to adjust or swing said draw bar into position to couple with such other cars; and that the knuckle, knuckle pin and lock of said coupler were so rusted, worn and battered that instead of operating freely in response to the cutting lever, operated from the side of said tender, they would bind to such an extent that said knuckle would not open sufficiently to couple with other cars automatically upon impact, but rendered it necessary for employees to go in between said tender and cars to open said knuckle before such coupling could be made.

"Plaintiff further says that on said date he was in the employ of defendant company as a brakeman; that in the course of his said employment it then and there became his duty to couple said locomotive tender to a certain railroad car on said switch track; that said locomotive tender and said car, by reason of said defective and inoperative coupler, failed to couple automatically upon impact, and rendered it necessary for this plaintiff to go between said locomotive tender and car to open said knuckle and adjust said coupler, as aforesaid; that when this plaintiff attempted so to do his left foot, ankle and leg became caught between said locomotive tender and car, crushing it so that it had to be amputated about three inches above the ankle thereof.

"Plaintiff further says that his said injuries were the direct and proximate result of the gross negligence and carelessness of defendant company, in this, to wit:

"First, in causing and permitting said locomotive tender to be hauled or used when said coupler was defective and inoperative and could not be coupled automatically by impact without the necessity of plaintiff going between the ends, as aforesaid.

"Second, in failing and neglecting to have a coupler on said tender that could be coupled automatically upon impact without the necessity of plaintiff going between the ends, as aforesaid."

The answer denies the allegation of the amended petition and alleges that plaintiff was himself negligent in violating the rule of the company and in carelessly and heedlessly putting his foot in such a position that it was injured when in the exercise of due care for his own safety he could have performed his work in a proper manner without injury to himself (R., p. 7).

2

Findings of Fact.

The following interrogatories were submitted by the plaintiff and answers returned by the jury:

> "At the time of the accident to plaintiff was the draw-bar in such condition as necessitated plaintiff to line up the draw-bar before a coupling could be made?
> "Yes.
> "F. W. BANKS, *Foreman.*"
>
> "At the time of the accident to plaintiff, could the plaintiff open the knuckle solely by reason of the cutting-lever?
> "Yes.
> "F. W. BANKS, *Foreman.*"
>
> "At the time of the accident to plaintiff, was it necessary for plaintiff to open the knuckle by hand?
> "No.
> "F. W. BANKS, *Foreman.*"

(R., p. 11.)

The defendant filed its motion for a judgment, notwithstanding the verdict upon special findings of fact, upon the ground that the same are inconsistent with the general verdict (R., p. 8). This motion was overruled and judgment entered on the general verdict (R., p. 11). Motion for new trial was also overruled (R., p. 11).

General Facts.

That plaintiff's testimony and claim are inconsistent with the special findings by the jury is apparent from the following extraction of his testimony:

> "Q. How high did you lift it (the lever)?
> "A. As high as it would go.
> "Q. How high would that be?
> "A. Well, I don't know.

"Q. What prevented it from going higher?
"A. Why, the pin. The chain was on the pin and when you pulled it up you pulled it up as high as it would go.
"Q. What prevented it from going any higher?
"A. The length of the chain.
"Q. Well, was the chain stretched tight?
"A. Yes, sir.
"Q. The handle could still have moved up further had the chain been longer?
"A. Yes, sir."

•

A little further along, in attempting to explain himself out of this difficulty, we find the following:

"Q. Well, do you know what is the reason it didn't come up higher?
"A. Well, I know that I pulled the lever up and jerked on it as far as I could get it, and the knuckle just moved. Now I don't know whether you would blame that on the pin or not.
"Q. Well, did you see the pin?
"A. You can't see the inside from the outside."
(R., pp. 20, 21.)

Another explanation was offered by the witness a little further along:

"Q. Well now Mr. Solomon, are you able to tell why it was that you couldn't pull this lever any higher? You said you noticed the length of the chain. First you said the pin was stuck, then you said you couldn't tell whether it was or not. Now can you tell why you couldn't pull that lever any higher?
"A. Because the lever in the middle of the cutting lever where the chain was on was sagged in, down."
(R., p. 22.)

Again, he vouchsafes the following:

"Q. Now, I am asking you why wouldn't it open at this time that you speak of, are you able to tell? You told us first that the pin would catch.

> Then you said this cutting lever was bent. Now what was the reason, or do you know at all? What I want to get at is what was wrong with this coupler that you couldn't open it?
>
> "A. Why the knuckle in it for one thing was loose."
>
> (R., p. 23.)

We think that this is sufficient to demonstrate that plaintiff's claim concerning the condition of the coupler was wholly unfounded and that he knew of nothing wrong with it, but was simply trying to place the result of his own carelessness as a charge against the company.

Rule of the Company.

There was a rule of the railroad company in force at the time requiring that "no one shall go between cars for the purpose of opening knuckles, unless the cars are at least ten feet apart and are not in motion, and not then unless he has notified the conductor or person in charge."

(R., p. 165.)

The Manner in Which the Accident Happened.

The testimony of Solomon as to how he was injured is as follows:

> "A. Well when I went up there after that car I throwed the switch over and then I—was about five or six yards away, maybe seven, away from the footboard—that engineer had a fashion of pulling a little over the switches—and I gave him a signal to back up and I stepped on the footboard and when I stepped on the footboard I didn't just turn right around, you know, stood on there maybe five or six, maybe seven or eight seconds,—turned around and looked at the draw-bar and she was closed. I looked at the one on the car and it was open. Well I went to open this here coupler on the tender of the engine with

> the cutting lever and I jerked it three or four times and she wouldn't open. She just kind of,—just moved,—jerked it again and she would move a little, then,—well I was getting so close then,—now whether the jerking on this or not fetched the drawbar over to me or not I don't know but she was clear over and when I got so close that I could see them coming together I seen she was out of line and I stuck my foot up to kick it over and just as I was about half ways over my foot slipped off and went in between them when they came together."
>
> (R., pp. 15, 16.)

On these facts we claim that the judgment of the Supreme Court of Ohio should be reversed and final judgment entered in favor of plaintiff in error first, because under the provisions of the Safety Appliance Act of Congress defendant was not negligent and the plaintiff is not entitled to recover, and that the right, privilege, and immunity from liability asserted under such Federal statute was denied by the judgment rendered by said court, and, second, that said judgment operates in contravention of article 14, section 1, of the Constitution of the United States, which insures the privilege and immunity of citizens of the United States, and prohibits the State from depriving any person of life, liberty, or property without due process of law.

Assignment of Errors.

The petition for writ of error and assignments of errors are found in the record at pages 169 to 172, both inclusive. The errors assigned and relied upon are as follows:

> "1. The court erred in overruling and denying the motion of plaintiff in error for judgment on special findings of fact made and returned by the jury in said cause.
>
> "2. The court erred in submitting to the jury the question whether there was an unreasonable amount of side play in the drawbar of said coupler, and in

permitting the jury to find and determine whether there was an unreasonable amount of side play which would not be a proper compliance with the Safety Appliance Statutes.

"3. That the court erred in holding and interpreting the provisions of the Safety Appliance Act of Ohio (Gen. Code of Ohio, sec. 8950), to prohibit the use of a coupler with a lateral play of two and ne-half inches, it appearing in the record of this case that such amount of side play is necessary to the operation of a railroad, and the use of automatic couplers, and said court in so holding and interpreting said statute deprived plaintiff in error of its rights and property without due process of law.

"4. That the court erred in holding and interpreting the provisions of the Safety Appliance Act of the United States of March 2, 1893 (27 Stat. at L., 531, chap. 196; U. S. Comp. Stat., 1901, p. 3174), as amended by the act of March 2, 1903 (32 Stat. at L., 943, chap. 976, U. S. Comp. Stat. Supp. 1909, p. 1143), to prohibit the use of a coupler with a lateral play of two and one-half inches, it appearing in the record of this case that such amount of side play is necessary to the operation of a railroad, and the use of automatic couplers, and said court in so holding and interpreting said statute deprived plaintiff in error of its rights and property without due process at law.

"5. The court erred in denying the claim specially set up and made by this plaintiff in error that under all the evidence in the case, and in the light of the special findings of fact returned by the jury, there was no negligence on the part of plaintiff in error, and that to sustain the verdict and the judgments of the lower courts would amount to the taking of property of this plaintiff in error without due process of law for the reason, as disclosed by the evidence, that the side play of two and one-half inches in the coupler in question is necessary and is the standard recognized as used by railroads everywhere as well as by the Master Car Builders Association, and it is impracticable, if not altogether impossible to operate a railroad without such amount of side play.

"6. The interpretation placed upon the Safety Appliance Act of the State of Ohio (Gen. Code of Ohio, sec. 8950), is contrary to and in violation of the statutes and laws of the United States as to safety appliance on cars used on interstate railroads, and is contrary to the laws and the Constitution of the United States in that it deprives said Erie Railroad Company of its property without due process of law.

"7. That the judgment of said court is repugnant to and in conflict with the laws of the United States, and especially that act of Congress of the United States commonly called the Safety Appliance Act of March 2, 1893 (27 Stat. at L., 531, chap. 196; U. S. Comp. Stat., 1901, p. 3174), as amended by the act of March 2, 1903, (32 Stat. at L., 943, chap. 976 U. S. Comp. Stat. Supp., 1909, p. 1143.

"8. That the judgment of said court is repugnant to and in conflict with article 14, section 1 of the Constitution of the United States which declares 'No State shall make or enforce laws which shall abridge the privilege or immunity of citizens of the United States, nor shall any State deprive any person of life, liberty or property without such process of law.'"

The questions were duly and seasonably made and proper exceptions saved, as shown by reference to our brief opposing the motion of defendant in error to dismiss, affirm, or transfer to summary docket, page 10.

Jurisdiction.

The question of jurisdiction is covered in our brief opposing the motion of defendant in error to dismiss, affirm or transfer to summary docket, to which reference is hereby made.

Synopsis of Argument.

First. A right, privilege, and immunity from liability was asserted and denied under the provisions of the Safety Appliance act of the United States.

a. The Federal Safety Appliance act controls.

b. The coupler satisfies the statute.

1. Facts.
2. Law.
3. Further facts as to conduct of plaintiff in error.
4. Application of law to facts.

Second. A right, privilege, and immunity from liability was asserted and denied under the Fourteenth Amendment, section 1, of the Constitution of the United States.

a. Ohio statute.

b. Effect of the Judgment in the Supreme Court of Ohio.

ARGUMENT.

First. A right, privilege, and immunity from liability was asserted and denied under the provisions of the Safety Appliance act of the United States of March 2, 1893, 27 Stat. at L., 531, chap. 196; U. S. Com. Stat., page 3174, as amended by the act of March 2, 1903, 32 Stat. at L., 943, chap. 976; U. S. Com. Stat., Supp. 1909, page 1143.

We claimed that the coupler satisfied the requirements of the Federal Safety Appliance act and that there was no negligence upon the part of the railroad company. As a result, therefore, the immunity from liability claimed by the railroad company is denied by the judgment of the Supreme Court of Ohio.

A. *The Federal Safety Appliance Act Controls.*

The important parts of the Federal statute read as follows:

> "SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be

unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Act March 2, 1893, c. 196, § 2, 27 Stat., 531.
Act March 2, 1903, c. 976.

"An act to amend an act entitled 'An act to promote the safety of employés and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes,' approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six." (32 Stat., 943.)

"Be it enacted, &c., That the provisions and requirements of the act entitled 'An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes,' approved March second, eighteen hundred and ninety-three, and amended April first, eighteen hundred and ninety-six, shall be held to apply to common carriers by railroads in the Territories and the District of Columbia and shall apply in all cases, whether or not the couplers brought together are of the same kind, make or type, and the provisions and requirements hereof and of said acts relating to train brakes, automatic couplers, grab irons, and the height of drawbars shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six, or which are used upon street railways."

Act March 2, 1903, c. 976, § 1, 32 Stat., 943.

(1) For facts and authorities showing the applicability of the Federal statute we refer to our brief opposing motion of defendant in error to dismiss, affirm or transfer to summary docket, pages 6 and 7.

(2) The locomotive was an instrument regularly used in moving interstate commerce.

(R., pp. 13, 49, 55, 75, 110 and 119.)

It will be noted that section 1 of the act of March 2, 1903, chapter 96, provides "the provisions and requirements hereof, and of said acts relating to * * * automatic couplers * * * shall be held to apply to all trains, locomotives, tenders, cars, and similar vehicles used on any railroad engaged in interstate commerce, and in the Territories and the District of Columbia, and to all other locomotives, tenders, cars and similar vehicles used in connection therewith, excepting those trains, cars, and locomotives exempted by the provisions of section six of said act of March second, eighteen hundred and ninety-three, as amended by the act of April first, eighteen hundred and ninety-six, or which are used upon street railways."

> "The distinction between merchandise which may become an article of interstate commerce, or may not, and an instrument regularly used in moving interstate commerce, which has stopped temporarily in making its trip between two points in different States, renders this and like cases inapplicable.
>
> "Confessedly this dining car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic, and so within the law."
>
> Johnson *vs.* Southern P. Co., 196 U. S., 1; 25 Sup. Ct. Rep., 159.

B. *The Coupler Satisfies the Statute.*

(1) Facts.

(*a*) The coupler in question was a Standard Climax Automatic Coupler (R., p. 272, opposite p. 169). (*b*) The only claim of defect left to the jury is as to the amount of side play. (See special findings, R., p. 11, and compare with allegations of petition as above set forth.) (*c*) The amount of side play in this coupler is agreed by all witnesses to be two and one-half inches at the hanger (R., p. 37). We refer only to the testimony of one of plaintiff's witnesses. All other witnesses, both for plaintiff and defendant, testify to the same fact. Some witnesses took the measurements at the end of the draw-bar as about four and one-half inches. This measurement should not be confused with the one of two and one-half inches, taken at the hanger. (*d*) The coupler was new and had been used but three months (R., pp. 110 and 122). (*e*) This amount of side play is the standard used by railroads everywhere, and adopted by the Master Car Builders' Association (R., pp. 112-118, 119). There is no evidence to contradict this, but it is claimed argumentatively that a coupler with less side play could be successfully used, although there is no evidence, either expert or non-expert, to corroborate this claim. The side play was not increased by wear. (See photograph, R., p. 269, opposite p. 168, and particularly the original photograph attached to the original record.) Note that the measurement is taken at the hanger, or the iron strap underneath the draw-bar. (*f*) It is admitted by defendant in error that a certain amount of side play is necessary (R., p. 67). (*g*) The coupler was inspected daily (R., p. 123) and was subject to Federal inspection (R., p. 119). (*h*) The coupling attempted by Solomon was made on the very next attempt, without difficulty, upon impact and without the necessity of anybody being between the cars (R., pp. 65,

68). (*i*) No complaint was ever made by Solomon about the coupler (R., p. 55), and all the remaining members of his crew, and many others who used the coupler before and after the accident, testified without exception, that it worked properly and the same as any other standard automatic coupler in good condition (R., pp. 51, 55, 62, 64, 68, 75, 79, 89, 93, 99, 108, 112, 124, 133, 135, and 137).

(2) Law.

It is our contention that, as a matter of law, the coupler satisfies the statute and the railroad company is immune from liability, which immunity is denied by the judgment of the Supreme Court of Ohio, as it was also by the judgments of the lower courts.

(*a*) *Title of Act.*

The complete title is "An act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes, and their locomotives with driving-wheel brakes, and for other purposes."

For consideration see Pennell *vs.* Phila. & R. R. Co., 231 U. S., 675; 34 Sup. Ct. Rep., 220.

(*b*) *Language.*

The statute, as amended, makes it unlawful to have or use a locomotive "not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the cars." (See section 2.)

(*c*) *Judicial Interpretation.*

> "Appellant was not entitled to recover unless it appeared that appellee had violated either the Federal

or State statute requiring it to equip its engines and cars with automatic couplers, for by his pleadings appellant did not seek a recovery on any other ground. The part of the Federal statute (act March 2, 1893, c. 196; 27 Stat., 531; 3 U. S. Comp. St., 1901, p. 3174), applicable is as follows: 'That on and after the first day of January, 1898, it shall be unlawful for any such common carrier (that is, a common carrier engaged in interstate commerce by railroad) to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.' By the amendment of March 2, 1903 (U. S. Comp. St. Supp., 1911, p. 1314), the provisions of the act were made to apply to locomotives and tenders as well as to cars.

"The State statute is as follows: 'It shall be unlawful for any common carrier, engaged in' intrastate 'commerce as aforesaid, to haul or permit to be hauled or used on its line of railroad within the State of Texas, any locomotive, tender, car or similar vehicle employed in moving intrastate traffic within the said State which is not equipped with couplers, coupling automatically by impact, and which can be coupled and uncoupled without the necessity of men going between the ends of locomotives, tenders, cars and similar vehicles.' Article 6710, Rev. Stat. 1911.

"It will be observed that the statutes are the same, so far as they prescribe the kind of couplers with which railway companies are required to equip their cars, etc.

"It was not claimed that the couplers when placed on the engine and car were not such as the statutes required appellee to equip same with. The contention was that the one on the car had become so worn and defective it had ceased to be such a coupler as the statutes required appellee to have on the car.

"It appeared that at the time the accident occurred appellant was standing on the footboard of the engine. His account of the accident was as follows: 'I was trying to couple an engine onto this flat car, and the first time we hit it, trying to make a coupling,

the couplings didn't meet, and then I pulled the drawbar over to me as far as I could and thought it was over far enough to meet, and I gave the engineer a signal to come ahead, and just before we got to the flat car I saw that the drawbar on the car was over towards me, as far over as it would go, and I kicked the drawbar on the flat car as far as I could and the knuckle on the engine caught the sole of my shoe and dragged the foot into the coupling.' With reference to the defect, as he claimed, in the coupler on the car, appellant testified: 'It would move sideways too much. * * * It moved a good deal further than it ought to in order to be in first-class repair. * * * It had more play than it ought to have had. As to what the proper play of one of those drawheads is, how much to the right or left, I do not know the exact amount. I know about what it is. It is about three or four inches either way. This one had at least six inches. * * * After pulling the drawbar (on the engine) as far as I could in the direction of the other drawhead, it would not have made a coupling if I had not moved the drawhead on the flat car.' On his cross-examination, appellant testified 'there is some play in the couplers; if they didn't have any play, they could not go around curves. They have got to be adjusted on every car on the road, and they have got to be adjusted from time to time, in order to make them couple. Yes, sir; in every car, whether it is in good condition or otherwise. When these couplings first came together, one of them was too far over, and the engineer backed; he saw it hadn't coupled. I thought I had adjusted the knuckle so they would couple. * * * The only difference in adjusting this coupling and another is that you would have had to push this one about two inches further than you otherwise would. If it had been in perfect condition, the pulling the drawbar on the engine as far as it would go would have been far enough to make the coupling without moving the coupling any more.' Appellant testified that the engine and car coupled together at the time the toes of his foot were mashed, and his witness, Buchanan, testified that he 'followed the engine,' quoting from the record, 'and

coupled onto this car (the car on which Morris was riding at the time he was injured) three or four times after the accident, and had no trouble in making the couplings.'

"It is plain, we think, that the testimony recited did not show, nor in the least tend to show (and there is none in the record before us which did) that appellee had failed to comply with the requirement of either the Federal or State statute. On the contrary, it appeared that the engine and car were equipped with couplers which, notwithstanding a defect in the one on the car, if properly adjusted for the purpose would couple automatically by impact. It did not appear that in order to so adjust the couplers, it was necessary for some one to go between the ends of the engine and car. For aught appearing in the record to the contrary, the couplers could have been so adjusted by the manipulation of rods or levers, or otherwise, by a person standing entirely from between the ends of the engine and car. If they could have been so adjusted, it is clear appellee had not violated either of the statutes and that appellant was not entitled to recover on the ground that it had. The burden being on appellant to prove such a violation, and he having failed to do so, the trial court did not err in peremptorily instructing the jury to find for appellee." Morris *vs.* St. Louis Southwestern Ry. Co. of Texas (Texas), 158 S. W., 1055.

"Defendant in error suggests that there is a particular kind of automatic coupler that will enable the operator to raise the pin so as to permit the car to uncouple and will hold the pin above the coupler until it is jarred into place by impact. It is suggested that, if this cocking device had been in use on this locomotive, the deceased might have raised the pin before the movement commenced, and that the cars could thus have been uncoupled while the locomotive was standing still. Even if it be conceded that there is such a coupler known among railroad men, still the statute declared on does not require all railroads to adopt and use that particular device. Any standard coupler which will couple automatically by impact, and which can be uncoupled without requiring men to go between the ends of cars, would

satisfy the statute." Devine *vs.* Chicago & C. R. R. Co. (Ill.), 102 N. E., 803, 806.

"Science had offered, and practical use had approved, a remedy applicable not alone to the act of uncoupling, but also to that of coupling.

* * * * * * *

"Counsel for the railroad company deny, and opposing counsel affirm, the existence at the time of the enactment of this legislation of any automatic coupler which could be prepared for the impact or coupling by manipulating a lever or otherwise, without placing any portion of the body between the ends of the cars. The real situation then existing, if shown by evidence produced at the trial, or by something of which judicial notice could be taken, might have an important bearing upon the true meaning of these statutes in respect of the extent to which it was intended to dispense with the necessity of going between the cars; but no evidence upon this point was presented by either party, and counsel have not attempted to call our attention to anything which sustains either of their opposing assertions." Chicago, M. & St. P. Ry. Co. *vs.* Voelker, 129 Federal, 522-7; 65 C. C. A., 226, 231.

"Generally, the accepted rule is that if a given construction of a law leads to such results that it seems harsh, unreasonable, or to be performed with a great excess of difficulty, the court, on seeing such a prospect, will turn back to see if a construction is possible whereby such consequences can be avoided and another construction imposed having a more reasonable result. Such an act, we think, ought not to be so construed as to imply the intention to impose these consequences, unless its provisions are such as to render the construction inevitable. A time-honored rule for the interpretation of statutes forbids it. Said Mr. Justice Field, in delivering the opinion of the Supreme Court in United States *vs.* Kirby, 7 Wall., 482; 19 L. Ed., 278.

" 'All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an ab-

surd consequence. It will always, therefore, be presumed that the legislation intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter.'

"This statement has been repeated by that court in numerous cases since that time; the latest being perhaps that of Jacobson *vs.* Massachusetts, 197 U. S., 11; 25 Sup. Ct., 358; 49 L. Ed., 643. It is the opposite of this to recognize a hardship, an injustice, and then to fortify the way to it by adopting the fatalistic answer, 'thus saith the law.' And it is, indeed, worse than this if the law does not say it at all. It is to assume the conclusion and then mold the premises so that they may justify the conclusion. Accidents will happen, and at places more or less remote from places of repair, or where the car cannot be left upon the track without peril to the public as well as to the employees. Undiscoverable defects may at any time appear while the car is moving on the track in a train, and it has been hauled in that condition before it can be known. We are not prepared to believe that Congress intended to impose a law upon a business of public utility which cannot be carried on without more or less frequent violations of such law, and to fasten thereon a liability to prosecution as for a crime or misdemeanor.

"Among the fundamental legal principles, Broom in his Legal Maxims, *238, classes the maxim *'Lex non cogit ad impossibilia,'* a rule of law which applies to statutes of the most positive character, statutes which cannot by any rule of construction be so interpreted as to prevent the certainty of the result. And in his commentary upon it he says:

" 'The law in its most positive and peremptory injunctions is understood to disclaim, as it does in its general aphorisms, all intention of compelling to impossibilities and the administration of laws must adopt that general exception in the consideration of all particular cases.'

"While this maxim is not uniformly applicable, as, for instance, when the statute relates to a dangerous business and gives a private remedy we think it is a proper one to apply in the construction of a law in-

flicting a penalty, and the business to which it relates is not itself unlawful." United States *vs.* Illinois Cent. R. Co., 170 Federal, 542, 549.

"The company, it is said, were bound to repair it on the spot, and if they did not, and any one was injured, they must bear the consequences. But reason is the life of the law. Co. Litt., 319*b*. And nothing, as it is said, is law that is not reason. Powell, J., in Coggs *vs.* Bernard, 2 Ld. Ray., 911. And by every consideration, the statutes here, the same as in any case, are to have a sensible construction. United States *vs.* Kirby, 7 Wall., 482; 19 L. Ed., 278. And the difficulties, not to say absurdities, to which the doctrine contended for would lead, are obvious. This is not to say that the statutes in question are satisfied by the exercise of reasonable diligence on the part of a common carrier by railroad, to see that its cars are equipped as there required (St. Louis, Iron Mount. & S. R. Co. *vs.* Taylor, 210 U. S., 281, 28 Sup. Ct., 616, 52 L. Ed., 1061; Chic., Milwaukee & St. Paul R. R. *vs.* United States, 165 Fed., 423, 91 C. C. A., 373, 20 L. R. A. (N. S.), 473; Atlantic Coast Line R. R. *vs.* United States, 168 Fed., 175, 94 C. C. A., 35); but only that a reasonable interpretation is to be given these acts in determining what is required and when it is required of such carriers. In the present instance, the acts do not apply because, rightly considered, the case is not within them. Siegel *vs.* New York Cent. & H. R. R., 178 Federal., 873, 875.

"The act was passed for practical purposes. It does not assume the impossible and lay a forfeiture against the laws of nature." U. S. *vs.* Atchison, T. & S. F. Co., 150 Federal, 442.

"Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation leading to hardship and injustice, if any other interpretation is reasonably possible." St. Louis & Iron Mountain Ry. Co. *vs.* Taylor, 210 U. S., 281, 295.

"We need not refer to them with further detail except to say that the custom of the railroads could not, of course, justify a violation of the statute, but that custom, having the acquiescence of the Interstate Commerce Commission, is persuasive of the

meaning of the statute." Pennell *vs.* Phila. & R. R. Co., 231 U. S., 675; 34 Sup. Ct. Rep. 220, 221.

"In each of these cases, the letter of the act was construed in the light of its spirit and purpose, as indicated by its title no less than by the enacting clauses. The same guiding principle should be adhered to in considering the question now presented." Southern R. Co. *vs.* Crockett, 234 U. S., 725; 34 Sup. Ct. Rep., 897, 901.

The following cases are cited on the proposition that the act should have a reasonable interpretation:

Union Pacific R. R. *vs.* Brady, 161 Fed., 719.

U. S. *vs.* Erie R. R. Co., 197 Fed., 287; 212 Fed., 853.

C., B. & Q. Co. *vs.* United States, 211 Fed., 12.

United States *vs.* Boston & Maine R. Co., 168 Fed., 148.

United States *vs.* R. G. Ry. Co., 174 Fed., 399.

Pennell, Admrx., *vs.* P. & R. Co., 231 U. S., 675.

(3) Further Facts as to Conduct of Defendant in Error.

The coupler satisfied the statute, and had Solomon observed the rule of the railroad company, made to meet such a situation as this, the accident would not have happened.

(*a*) *Rule No. 266 in the printed book of rules of the company and the effect thereof is shown by the following notice:*

"ERIE RAILROAD COMPANY,
"OFFICE OF SUPERINTENDENT,
"MAHONING DIVISION,
"YOUNGSTOWN, OHIO, *March 9th* 1911.

"All concerned:

"Accidents are constantly increasing account violation of Rule 266.

"This rule requires that no one shall go between cars for the purpose of opening knuckles, unless the

cars are at least ten (10) feet apart and are not in motion, and not then unless he has notified the conductor or person in charge. It is noticed that men jump between cars when there is not sufficient time to do the work. Sometimes they are between the cars and the engineer, through signals from some one else who does not know that another is between the cars, moves a section of the train back, and the result is personal injury, and in a great many cases death. Your attention was called to this rule February 28th. In future when men are discovered violating this rule, they will be taken out of the service.

"F. J. MOSER,
"Superintendent."

(R., p. 165.)

Solomon's receipt for a book of rules is shown (R., p. 167). The above notice was properly posted (R., p. 162). Many of the witnesses saw and read it. Although Solomon denied knowledge of the rule, there is no doubt, under the facts proven, that he knew its contents, or is at least chargeable in law with having known the same.

(*b*) *Conduct of Solomon.*

Defendant in error testified that he was on the engineer's side and could have stopped the engine.

"Q. You were on the engineer's side, weren't you?
"A. Yes, sir.
"Q. You were head brakeman?
"A. Yes, sir.
"Q. You were placed there to give signals to him directing and controlling the movements of the engine so far as the making of any couplings were concerned?
"A. Yes, sir.
"Q. And he was bound to obey any signal that you gave him?
"A. Yes, sir.
"Q. If you signaled to him to stop when you discovered the draw-bars were closed or were out of line he would have stopped his engine?

"A. He couldn't have stopped.
"Q. Why?
"A. He was too close.
"Q. Why you were about two and one-half car lengths away when it was discovered?
"A. Oh, my, no—when we started back—you must recollect that a fellow has something else to think about——
"Q. But I am just asking you this question,—when you discovered that the coupler of the car was open and the one on the engine was closed and you tugged at that lever and it wouldn't open, if you had signaled to the engineer he could have stopped his engine?
"A. No, not where I was.
"Q. He would have stopped it in response to your signal?
"A. He would have tried to, I suppose.
"Q. And then you could have adjusted the coupler so it would have opened, couldn't you?
"A. Yes, sir.
"Q. And you wouldn't have been in danger of getting your foot caught, if you had waited till the engine had stopped in response to your signal?
"A. I never seen a man do that in my life.
"Q. I know, but you could do it, couldn't you?
"A. Oh, you could do it, yes sir.
(R., pp. 32, 33.)

"Q. Mr. Solomon, about how fast was your engine moving as you came down there to make this coupling?
"A. About as fast as you can walk.
"Q. And how close was your engine to this car when you first noticed that the couplers were not in line?
"A. About a half car length.
"Q. What?
"A. About a half car length. Maybe not that.
"Q. About a half car length?
"A. I can't tell you that.
"Q. How close was it when you reached over with your foot to kick that coupler in place and in line with the one on the car?
"A. About two and one-half or three feet.

"Q. Now at any time from the time when you first discovered that it was necessary to make any adjustment of that coupler you could have notified the engineer by signaling him and he would have been required to stop?

"A. He would if any of them would do it but I never seen any of them do it.

"Q. But if you had done it he would have stopped and he was required to stop?

"A. He might not.

"Q. It was his duty to observe your signals?

"A. It was his duty but does an engineer always see a signal?

"Q. And you knew that at that time?

"A. I wasn't thinking about that then.

"Q. Well you knew it to be a fact at that time?

"A. Yes, sir, if you gave an engineer a signal to stop he would stop if he would see you.

"Q. And yet when your engine was down there within two and one-half feet of that box car you deliberately took your foot and tried to shove that coupler over so it would be in line with that one on the car?

"A. Yes, sir.

"Q. And your foot slipped off and was caught between the knuckles and crushed?

"A. Yes, sir.

(R., pp. 33, 34.)

The object of Rule No. 266 called to the attention of the plaintiff and other employees by bulletin of March 9, 1911, is to provide a method for coupling cars in safety when the brakeman discovers physical conditions which require the coupler to be lined up. It is clear from the testimony of all the witnesses that because of the necessary side play there are times when couplings will not make unless this be done, and by observing the rule it can be accomplished at a safe and proper time without danger to the brakeman. The rule and bulletin are plain on this point. There is no claim that Solomon did not have sufficient time to stop the engine and line up the coupler, if that was necessary.

(4) Application of Law to Facts.

We contend for a reasonable and just interpretation and construction of this statute. It is, we understand, a fundamental rule that the legislature intended the law to operate justly.

Metmore *vs.* Markoe, 196 U. S., 68-77.

It is the province of the court to construe and enforce the statute, but to give it that construction which best comports with the principles of reason, justice, and convenience.

We have been unable to find a case where the facts were the same as in the case at bar, but authorities to which reference is made above are all to the effect that a reasonable interpretation is to be made, and that Congress did not intend to impose any impossible obligations upon a railroad company. The evil sought to be remedied and the legislative intent are carefully treated in Johnson *vs.* Southern P. Co., 196 U. S., 1; 25 Sup. Ct. Rep., 159. We quote from the opinion as follows:

> "The risk in coupling and uncoupling was the evil sought to be remedied, and that risk was to be obviated by the use of couplers actually coupling automatically. True, no particular design was required, but, whatever the devices used, they were to be *effectively interchangeable*. Congress was not paltering in a double sense. And its intention is found 'in the language actually used, interpreted according to its fair and obvious meaning.'
>
> United States *vs.* Harris, 177 U. S., 309; 44 L. ed., 782; 20 Sup. Ct. Rep., 609.

> "That this was the scope of the statute is confirmed by the circumstances surrounding its enactment, as exhibited in public documents to which we are at liberty to refer.
>
> Binns *vs.* U. S., 194 U. S., 486, 495; 48 L. ed., 1087, 1091; 24 Sup. Ct. Rep., 816.
>
> Church of Holy Trinity *vs.* United States, 143 U. S., 457, 463; 36 L. ed., 226, 229; 12 Sup. Ct. Rep., 511.

"President Harrison, in his annual message of 1889, 1890, 1891, and 1892, earnestly urged upon Congress the necessity of legislation to obviate and reduce the loss of life and the injuries due to the prevailing method of coupling and braking. In his first message he said: 'It is competent, I think, for Congress to require uniformity in the construction of cars used in interstate commerce, and the use of improved safety appliance upon such trains. Time will be necessary to make the needed changes, but an earnest and intelligent beginning should be made at once. It is a reproach to our civilization that any class of American workmen should, in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war.'

"And he reiterated his recommendation in succeeding messages, saying in that for 1892: 'Statistics furnished by the Interstate Commerce Commission show that during the year ending June 30, 1891, there were forty-seven different styles of car couplers reported to be in use, and that during the same period there was 2,660 employees killed and 26,140 injured. Nearly 16 per cent of the deaths occurred in the coupling and uncoupling of cars, and over 36 per cent of the injuries had the same origin.'

"The Senate report of the first session of the Fifty-second Congress (No. 1049) and the House report of the same session (No. 1678) set out the numerous and increasing casualties due to coupling, the demand for protection, and the necessity of automatic couplers, *coupling interchangeably*. The difficulties in the case were fully expounded and the result reached to require an automatic coupling by impact so as to render it unnecessary for men to go between the cars; *while no particular device or type was adopted, the railroad companies being left free to work out the details for themselves,* ample time being given for that purpose. The law gave five years, and that was enlarged, by the Interstate Commerce Commission, as authorized by law, two years, and subsequently seven months, making seven years and seven months in all.

"The diligence of counsel has called our attention

to changes made in the bill in the course of its passage, and to the debates in the Senate on the report of its committee.

24 Cong. Rec., pt. 2, pp. 1246, 1273, *et seq.*

"These demonstrate that the difficulty as to interchangeability was fully in the mind of Congress, and was assumed to be met by the language which was used. *The essential degree of uniformity was secured by providing that the couplings must couple automatically by impact without the necessity of men going between the ends of the cars.*"

As pointed out, the object of the legislature was to secure couplers "effectively interchangeable." It was not intended to legislate contrary to the laws of nature and the laws of physics. Railroads cannot be built without curves, and especially is it impossible to make switch yards and tracks to industries without departing at needed places from a straight line; so that curves must be taken into consideration in interpreting any statute relating to railroad operation, and since curves cannot be avoided, neither can couplers be made without side play. Otherwise a train never could be hauled around a curve. It is claimed argumentatively that a coupler *might* be invented which it would not be necessary to line up. That is a consummation devoutly to be wished, and perhaps some day it may be accomplished. Suffice it to say that the record shows that no such contrivance is now in existence. The use of springs is suggested. As pointed out by the witnesses, practical men, while springs might hold the drawbars in line on a straight track, they would not on a curve, and in the latter situation they would prevent placing the drawbar in position so the cars would couple. The coupler in question is an automatic coupler. It does couple automatically and by impact, and it can be uncoupled without the necessity of men going between the ends of the cars. In short, it is as practical as it is possible for a coupler to be made. If at any time it becomes necessary, by reason of physical conditions, to line up the coup-

lers, the rules of the company and the common sense of the operators provide a way in which it may be done when the engine is motionless and there is no danger. With this accomplished the engine can be backed against the car and the coupling made entirely automatically and without the necessity of anybody being between the cars.

One object of the statute is to promote the safety of employés, so far as practicable, by compelling the use of a coupler which will couple automatically *without need of the presence of a brakeman at or near the point of contact when a coupling is made.* The value of the statute is apparent only when it is so construed as to accomplish this result. Not only does it require the railroad company to adopt this kind of a coupler, but we think good sense shows that it contemplates in its application the exercise of due care on the part of the brakeman using the coupler. If the object is to prevent personal injury, loss of life and limb, the maiming and injuring of trainmen, how far will that object be accomplished by saying that even although the railroad company has done all it can do, and has provided the very best obtainable coupling device known to the art, still the operator is excused when he violates the rules of the company and the dictates of good judgment, and carelessly and deliberately puts his foot between cars just as they are about to couple, when there is a safe manner of making any adjustment which may be necessary. If this is the interpretation to be placed upon this statute then it fails of its purpose, and its object is not to prevent injury to trainmen, but to put a premium upon carelessness and to make the railroad company an insurer of the brakeman, not only against its own default, but against the criminal carelessness of the brakeman himself.

Surely this cannot be the law. The law as conceived and enacted is highly beneficial, and it offers that protection to a large and useful class of citizens which they are entitled to have because of the dangers naturally incident to and in-

herent in their business; but the same characteristics of that business—the same dangers which require this high duty of the employer—likewise require the exercise of due care and diligence from the employé, and to place upon this statute the interpretation given it by the courts of Ohio is to destroy its main purpose and make it simply an instrument of injustice. We are not contending that contributory negligence of the defendant in error is a defense in this case, but we are contending that when the railroad company has done all in its power to do, its duty is ended, and if thereafter, as a result of his own carelessness, defendant in error was injured, the railroad company is not required by any reasonable interpretation of this statute to bear the burden.

Second. A right, privilege, and immunity from liability was asserted and denied under the Fourteenth Amendment, section 1, of the Constitution of the United States, which declares, "No State shall make or enforce laws which shall abridge the privilege or immunity of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law."

(*a*) ***Ohio Statute.***

The Ohio statute on this subject is substantially the same as the Federal statute:

> "No such common carrier shall haul, or permit to be hauled or used on its line, a locomotive, car, tender, or similar vehicle used in moving State traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled, without the necessity of men going between the ends of the cars."
> General Code of Ohio, sec. 8950.

(*b*) *Effect of Judgment.*

The effect of the judgment of the Supreme Court of Ohio is to deprive plaintiff in error of its property without due process of law, because it imposes a penalty upon plaintiff

in error for using the very best coupler it could procure. All that has been said above with respect to what is a sufficient coupler under the Federal act is applicable to the State act, and that question will not be further discussed here. It may be argued that the Federal statute has no application to this case, and that the Ohio statute governs. To this proposition we cannot accede for the reasons above stated, but, be that as it may, the result is the same in either case. The effect of the judgment of the Supreme Court of Ohio is to make unlawful the use of a Standard Climax Automatic Coupler with a side play of two and one-half inches, which the record shows is necessary to the operation of a railroad. To comply with the statute as interpreted and enforced by this judgment, the railroad company would be required to stop operating its trains. To operate the railroad and at the same time comply with such requirements would be an impossibility in the present stage of development of the art of railroading. This, we contend, is taking property of the railroad company without due process of law. Such an interpretation cannot be put upon the Federal statute. If this meaning is attempted to be drawn from the State statute, the result is that the State statute is thereby made to operate in contravention of the provisions of section 1 of the 14th Amendment of the Constitution of the United States, and cannot stand.

In the case of Fayerweather *vs.* Ritch, 195 U. S., 276, the following language is quoted with approval from the case of Davidson *vs.* New Orleans, 96 U. S., 97-102:

> "But a State may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form. This

court, referring to the Fourteenth Amendment, has said: 'Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the States is of no avail, or has no application where the invasion of private rights is effected under the forms of State legislation.' "

See also Chicago, etc., R. Co. *vs.* Chicago, 166 U. S., 226-241.
Smyth *vs.* Ames, 169 U. S., 466.
San Diego Land, etc., Co. *vs.* National City, 174 U. S., 739-754.

Conclusions.

In addition to what is said on page 13 *et seq.* of our brief opposing motion of defendant in error to dismiss, affirm, or transfer to summary docket, we wish to say the only theory upon which this judgment can be sustained is that it is possible to make a coupler with sufficient play that it will not break or derail cars when going around a curve, and still be so constructed that it will couple on a curve and under every unfavorable condition which will be met in the operation of a carefully and properly constructed railroad. But it is nevertheless true that this never has been done, no method being known how to do it. The record in this case shows this fact, which, as indicated in Chicago, M. & St. P. Ry. *vs.* Voelker, 129 Fed., 522; 65 C. C. A., 226-231, must be treated as "having an important bearing upon the meaning of this statute in respect to the extent to which it was intended to dispense with the necessity of going between the cars." It is interesting to note what is said in volume 22 of the Encyclopædia Britannica, 11th ed., page 855. We quote in part as follows:

"This form of automatic coupler has now gained practically universal acceptance in the United States. To effect this result required many years of discussion and experiment. The Master Car Builders' Associa-

tion, a great body of mechanical officers, organized especially to bring about improvement and uniformity in details of construction and operation, expressed its sense of the importance of 'self-coupling' so far back as 1874, but no device of the kind that could be considered useful had then been invented. At that time, a member of the association referred to the disappearance of automatic couplers which had been introduced thirty or forty years before. This body pursued the subject with more or less diligence and in 1884 laid down the principle that the automatic coupler should be one acting in a vertical plane—that is, the engaging faces should be free to move up and down within a considerable range in order to provide for the differences in the height of cars. By the fixing of this principle, the task of the inventor was considerably simplified. In 1887 a committee reported that the coupler in question was the 'knottiest mechanical problem that had ever been presented to the railroad,' and over four thousand attempted solutions were on record in the United States Patent Office. The committee had not found one that did not possess grave disadvantages, but concluded that 'the principle of contact of the surfaces of vertical surfaces embodied in the Janney coupler afforded the best connection for cars on curves and tangents'; and in 1887 the association recommended the adoption of a coupler of the Janney tpye which, as developed later, is shown in Fig. 28. The method of constructing the working faces of this coupler is shown in Fig. 29. The principle was patented, but the company owning the patent undertook to permit its free use by railway companies which were members of the Master Car Builders' Association, and thus threw open the underlying principle to competition. From that time the numerous patents have had reference merely to details. Many different couplers of the Janney type are patented and made by different firms, but the tendency is to equip new cars with one of only four or five standard makes. The adoption of automatic couplers was stimulated in some degree by laws enacted by the various States and by the United States; and the Safety Appliance Act passed by Con-

> gress in 1893 made it unlawful for railways to permit to be hauled on their lines after the first of January, 1898, any car used for interstate commerce that was not equipped with couplers which coupled automatically by impact, and which could be uncoupled without the necessity for men going in between the ends of the cars. The limit was extended to the first of August, 1900, by the Interstate Commerce Commission, which was given discretion in the matter."

It will be noted that the experts of the Master Car Builders' Association considered the coupler question "the knottiest mechanical problem that had ever been presented to the railroad," and that there were over four thousand solutions on record in the United States Patent Office. It will also be noted that in Europe "the great majority of couplings remain non-automatic." It will also be noted that the authority last above mentioned speaks of the Master Car Builders' Association. At page 118 of the record the rule of the Master Car Builders' Association is stated as follows:

> "Side clearance of couplers," "that the total side clearance of couplers be two and one-half inches."

When authorities like this agree that nothing more can be done than has been done, is the enforcement of this judgment not the taking of the property of the plaintiff in error without due process of law? The effect is that the railroad company is required to pay a verdict and judgment of sixty-five hundred dollars because it does not accomplish an impossibility. Nor does it relieve the situation to argue that some other coupler might be invented.

It is now possible for a man to remain in the air for an hour or more in a heavier-than-air machine, but would it not have been unconstitutional fifty years ago to require by statute that a man remain in the air for an hour in a machine heavier than air or pay damages?

It is impossible now to build the kind of a coupler defendant in error claims should have been used; therefore

we contend that the Federal act does not require it, and, if the State act does require it, it is unconstitutional and the effect of this judgment in either instance is the same.

Nor can the question be avoided by saying it is for the jury. Where there is no conflict in the evidence, it is a question of law for the court. We do not think the jury is in a position to say that it was unlawful for this railroad company not to do a thing which trained men agree is impossible.

Respectfully submitted,

C. D. HINE,
Attorney for Plaintiff in Error.

Received a copy of the above brief this 19th day of February, A. D. 1915.

EMIL J. ANDERSON,
Attorney for Defendant in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 559.

ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JOSEPH SOLOMON, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF OHIO.

MOTION TO DISMISS, AFFIRM, OR TRANSFER TO SUMMARY DOCKET, BRIEF, AND PARTIAL TRANSCRIPT.

EMIL J. ANDERSON,
Of Youngstown, Ohio,
Attorney of Record for Defendant in Error.

(24,303)

AUTHORITIES CITED.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 559.

ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JOSEPH SOLOMON, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF OHIO.

MOTION TO DISMISS WRIT OF ERROR OR TO AFFIRM OR TO TRANSFER TO THE SUMMARY DOCKET.

Now comes the defendant in error, Joseph Solomon, by his attorney of record herein, and moves this honorable court:

First. To dismiss the writ of error herein on the ground that this court has not jurisdiction thereof, no Federal question being involved therein.

Second. To affirm the judgment of the Supreme Court of the State of Ohio on the ground that it is manifest that

this writ of error was taken for delay only, and that the questions upon which the decision in this cause depend are so frivolous as to need little or no argument.

Third. To transfer this cause for hearing to the summary docket, if this court should refuse to dismiss or to affirm, because the case is of such a character as not to justify extended argument.

EMIL J. ANDERSON,
Of Youngstown, Ohio,
Attorney of Record for Defendant in Error.

NOTICE OF MOTION.

The plaintiff in error is hereby notified that the defendant in error will, on the 7th day of December, A. D. 1914, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as a hearing may be had, submit for the consideration of said court the foregoing motions, and each of them, and the brief in support thereof, hereto attached, including portions of the record and sections of Ohio safety appliance act and of the Constitution of the State of Ohio in said cause, as contained in an appendix thereto, all of which are now served upon you herewith.

EMIL J. ANDERSON,
Of Youngstown, Ohio,
Attorney of Record for Defendant in Error.

Received a copy of the foregoing notice, brief, and appendix thereto attached this 11th day of November, A. D. 1914.

C. D. HINE,
Of Youngstown, Ohio,
Attorney of Record for Plaintiff in Error.

II.

FACTS.

The plaintiff in error hauled and used in purely State traffic at Youngstown, Ohio, a locomotive tender, when the coupler thereof, in violation of the Ohio safety appliance acts, was so inoperative and defective that, in the language of the first amended petition:

> "The drawbar of said coupler had such a degree of sideplay that when it was pushed over to either side of the housing and hangers in which it was fastened it would not squarely meet the couplers of other cars, and would not couple with other cars automatically upon impact—so that it became and was necessary for employees to go in between the ends of said tender and cars to adjust or swing said drawbar into position." (Amount of sideplay 4½ inches.)

The trial jury, in a special verdict, found that by reason of such failure to couple automatically upon impact it was necessary for defendant in error to render personal assistance in "lining up" the coupler before a coupling could be made.

The pleadings in the trial court, as well as the proof, definitely limit not only the railroad itself, but also the equipment, traffic, and operations in question to the confines of the city of Youngstown, Mahoning County, Ohio. No suggestion of interstate traffic is found in the record.

III.

POINTS AND AUTHORITIES.

A Federal question cannot be raised for the first time in the petition for a writ of error from this court and the accompanying *assignment of errors.*

Haire *vs.* Rice, 204 U. S., 301.
Wabash R. R. *vs.* Flannigan, 192 U. S., 29.
Dewey *vs.* Des Moines, 173 U. S., 198.
Cal. Nat. Bank *vs.* Thomas, 171 U. S., 441.
Morrison *vs.* Watson, 154 U. S., 111.
Loeber *vs.* Schroeder, 149 U. S., 580.
Bushnell *vs.* Crook, 148 U. S., 682.
Caldwell *vs.* Texas, 137 U. S., 692.
Osborne *vs.* Clark, 204 U. S., 565.

A petition for a writ of error forms *no part* of the *record* on which it is to be ascertained whether the State court decided a Federal question.

Manning *vs.* French, 133 U. S., 186.
Clark *vs.* Penna., 128 U. S., 395.
French *vs.* Taylor, 199 U. S., 274.
Harding *vs.* Illinois, 196 U. S., 78.

A writ of error from a State court will be dismissed in the absence of a Federal question on the *record.*

Davidson *vs.* Connelly, 154 U. S., 589.
Mutual Ins. Co. *vs.* McGraw, 188 U. S., 291.
Clark *vs.* Penna., 128 U. S., 395.
Canal Co. *vs.* Paper Co., 172 U. S., 58.
City of Detroit *vs.* Guthard, 114 U. S., 133.

The briefs or arguments of counsel cannot be looked to for raising a Federal question.

N. Y. C. R. R. *vs.* N. Y., 186 U. S., 269.
Yesler *vs.* Wabash, etc., 146 U. S., 646.

IV.

ARGUMENT.

First. The first, second, third, and fifth assignments of error attempt to raise a Federal question by claiming that the interpretation by the State courts of the Ohio safety appliance acts deprived plaintiff in error of property without due process of law.

But is such a claim tenable in the light of the following considerations?

(A) The record absolutely fails to show that the validity of any State statute was challenged in the State courts on the ground of its repugnancy to paramount Federal law. Is not such failure alone fatal to their claim?

Beals *vs.* Cone, 188 U. S., 184.
Erie R. R. *vs.* Purdy, 185 U. S., 148.

(B) The record omits to affirmatively show either (*a*) that the claim raised in said assignment of errors was presented to the State courts, or (*b*) that it was decided, or (*c*) that its decision was necessary to the judgments rendered, or (*d*) that any such right, title, or immunity especially set up was denied.

The following authorities treat such omissions:

Cox *vs.* Texas, 202 U. S., 446.
Cal. *ex rel. vs.* Holladay, 166 U. S., 718.
E. & B. Ass'n *vs.* Kansas, 120 U. S., 103.
D. C. R. R. *vs.* Guthard, 114 U. S., 133.
Choteau *vs.* Gibson, 111 U. S., 200.
Crowell *vs.* Randall, 10 Pet., 368.

(C) No claim was especially made or set up in the State courts that plaintiff in error was deprived of property with-

out due process of law. And it is well settled that such claim cannot be made for the first time in the Supreme Court of the United States to sustain a writ of error to the State courts.

French *vs.* Taylor, 199 U. S., 274.
Re Robertson, 156 U. S., 183.

(D) Even an erroneous decision of a State court does not deprive the unsuccessful party of his property without due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States when the parties have been fully heard in the regular course of judicial proceedings. The record discloses that such a hearing was had in the case at bar.

Central Loan Co. *vs.* Laidley, 159 U. S., 103.
Bergman *vs.* Hacker, 157 U. S., 655.
Moreley *vs.* R. R., 146 U. S., 162-171.
Head *vs.* Amosheag Co., 113 U. S., 9.
Walker *vs.* Sanamit, 92 U. S., 90.
So. Ry. *vs.* King, 217 U. S., 524.

Second. The gist of the fourth and seventh assignments of error is the claim that the judgment of the State courts is repugnant to the Federal safety appliance acts.

QUÆRE.—Does not the foregoing claim appear frivolous in the light of the following propositions?

(A) What right, title, privilege, or immunity under the Federal safety appliance act was affirmatively, unmistakably, and specially called to the attention of, and passed upon by, the State courts? The record is silent. And this for the reason that the State courts, under the pleadings and evidence, proceeded upon the basis of "State traffic" instead of "interstate traffic." Hence, it is now too late to raise such

question for the first time in an assignment of error to the State court of last resort.

Chicago, I. & L. R. R. *vs.* McGuire, 196 U. S., 128.
So. R. R. *vs.* Carson, 194 U. S., 136.
L. & N. R. R. *vs.* Smith, 204 U. S., 551.
Nation *vs.* Thatcher, 189 U. S., 306.
Beals *vs.* Cone, 188 U. S., 648.
Axley Stave Co. *vs.* Butler Co., 166 U. S., 648.
Luper *vs.* Texas, 139 U. S., 462.
Brooks *vs.* Missouri, 124 U. S., 394.
Speis *vs.* Illinois, 123 U. S., 181.
Mills *vs.* Brown, 16 Pet., 525.
Crowell *vs.* Randall, 10 Pet., 525.
City of Detroit *vs.* Guthard, 114 U. S., 133.

(B) While the railroad of plaintiff in error may in fact be engaged in "interstate" traffic, nevertheless we have before us a case of purely State traffic. For, please permit us to repeat that the pleadings and evidence in the trial court unquestionably limited and confined not only the tracks used, the equipment hauled, the traffic handled, and the switching operations in question, but even the railroad itself to local State traffic. Then how can plaintiff in error make any successful attack under the Federal safety appliance act, when it cannot bring itself within the interstate traffic class?

Analogous authorities:

Seaboard Air Line *vs.* Seegers, 207 U. S., 73-76.
M., K. & T. Ry. *vs.* Cade, 233 U. S., 648.
Ply. Coal Co. *vs.* Penna., 232 U. S., 532.
Rosenthal *vs.* N. Y., 226 U. S., 260-271.
So. Ry. *vs.* Ring, 217 U. S., 524.
Hatch *vs.* Reardon, 204 U. S., 152.
Hooker *vs.* Barr, 194 U. S., 415-419.
Tyler *vs.* Judges, 179 U. S., 405.

Third. The seventh and eighth assignments of error contain the charge that the judgment of the Supreme Court of Ohio is in violation of article 14, section 1, of the Constitution of the United States.

We respectfully deny the foregoing charge. But even if such charge were well founded, it affords no ground for invoking the jurisdiction of this court, as will be seen by the following:

(A) The record fails to specify the violation of any clause whatever of the Constitution of the United States.

> "The clause in the Constitution and the law of Congress should have been specified by the plaintiffs in error in the State court, in order that this court might see what was the right claimed by them, and whether it was denied to them by the decision of the State court."
>
> Maxwell *vs.* Newbold *et al.*, 18 Howard, 511.

(B) The record does not disclose that any constitutional question was considered or passed upon.

> "A mere assertion in a State court of a right under the Constitution of the United States, in a petition for rehearing, affords no ground for invoking the jurisdiction of this court unless the court below, in dealing with the petition, considers and passes upon the Federal ground therein relied upon."
>
> Bowe *vs.* Scott, 233 U. S., 658.
>
> Morrison *vs.* Watson, 154 U. S., 111.

Therefore defendant in error respectfully submits that his injuries were sustained nearly three and one-half years ago; that the long delays incident to appellate procedure have already worked great hardships; that the writ of error is taken for delay only, and that the contentions upon which it is claimed a Federal question depends are believed to be so frivolous as not to require further argument.

EMIL J. ANDERSON,

Of Youngstown, Ohio,

Attorney of Record for Defendant in Error.

V.

APPENDIX.

Pursuant to the rules and practices of this honorable court, and for the purposes of these motions only, defendant in error has caused to be printed the assignment of errors to the Supreme Court of the State of Ohio, which accompanied the petition in error filed herein; also the sections of the Ohio safety appliance act under the provisions of which this case was tried in the State courts; also section of the Constitution of the State of Ohio in force at the time of trial, and also copy of special finding of fact referred to in assignment of errors.

Authorities:

Carey *vs.* Houston, 150 U. S., 179.
Rouch *vs.* Nevin, 128 U. S., 579.

IN THE SUPREME COURT OF THE STATE OF OHIO.

No. 13,964.

ERIE RAILROAD COMPANY, *Plaintiff in Error,*
vs.
JOSEPH SOLOMON, *Defendant in Error.*

Assignment of Errors.

Now comes Erie Railroad Company, plaintiff in error, above named, and respectfully submits that in the record, proceedings, decision, and final judgment of the Supreme Court of the State of Ohio, in the above-entitled matter, there is manifest error in this, to wit:

1. The court erred in overruling and denying the motion of plaintiff in error for judgment on special findings of fact made and returned by the jury in said cause.

2. The court erred in submitting to the jury the question whether there was an unreasonable amount of sideplay in the drawbar of said coupler, and in permitting the jury to find and determine whether there was an unreasonable amount of sideplay which would not be a proper compliance with the safety appliance statutes.

3. That the court erred in holding and interpreting the provisions of the safety appliance act of Ohio (Gen. Code of Ohio, sec. 8950) to prohibit the use of a coupler with a lateral play of two and one-half inches, it appearing in the record of this case that such amount of sideplay is necessary to the operation of a railroad and the use of automatic couplers, and said court in so holding and interpreting said statute deprived plaintiff in error of its rights and property without due process of law.

4. That the court erred in holding and interpreting the provisions of the safety appliance act of the United States (March 2, 1893, 27 Stat. at L., 581; chap. 196, U. S. Comp. Stat., 1901, p. 3174) as amended by the act of March 2, 1903 (32 Stat. at L., 943; chap. 976, U. S., Comp. Stat. Supp., 1909, p. 1143), to prohibit the use of a coupler with a lateral play of two and one-half inches, it appearing in the record of this case that such amount of sideplay is necessary to the operation of a railroad and the use of automatic couplers, and said court in so holding and interpreting said statute deprived plaintiff in error of its rights and property without due process of law.

5. The court erred in denying the claim specially set up and made by this plaintiff in error that under all the evidence in the case, and in the light of the special findings of fact returned by the jury, there was no negligence on the part of plaintiff in error, and that to sustain the verdict and the judgments of the lower courts would amount to the taking of property of this plaintiff in error without due

process of law, for the reason, as disclosed by the evidence, that the sideplay of two and one-half inches in the coupler in question is necessary and is the standard recognized as used by railroads everywhere as well as by the Master Car Builders' Association, and it is impracticable, if not altogether impossible, to operate a railroad without such amount of sideplay.

6. The interpretation placed upon the safety appliance act of the State of Ohio (Gen. Code of Ohio, sec. 8950) is contrary to and in violation of the statutes and laws of the United States as to safety appliances on cars used on interstate railroads, and is contrary to the laws and the Constitution of the United States in that it deprives said Erie Railroad Company of its property without due process of law.

7. That the judgment of said court is repugnant to and in conflict with the laws of the United States, and especially that act of Congress of the United States commonly called the safety appliance act of March 2, 1893 (27 Stat. at L., 531; chap. 196, U. S. Comp. Stat., 1901, p. 3174), as amended by the act of March 2, 1903 (32 Stat. at L., 943; chap. 976, U. S. Comp. Stat. Supp., 1909, p. 1143).

8. That the judgment of said court is repugnant to and in conflict with article 14, section 1, of the Constitution of the United States, which declares: "No State shall make or enforce laws which shall abridge the privilege or immunity of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law."

Wherefore said Erie Railroad Company prays that the judgment and decision aforesaid may be reversed and altogether held for naught, and that it may be restored to all things which it has lost thereby.

——— ———.

OHIO SAFETY APPLIANCE ACT.

Sec. 8950 (Gen. Code of Ohio):

"No such common carrier shall haul, or permit to be hauled or used on its line, a locomotive, car, tender, or similar vehicle used in moving State traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

Sec. 8955 (Gen. Code of Ohio):

"Any employee of such common carrier, who is killed or injured by a locomotive, tender, car, similar vehicle, or train, in use contrary to the provisions of sections eighty-nine hundred and forty-nine to eighty-nine hundred and fifty-four, both inclusive, shall not be deemed to have *assumed the risk,* thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, tender, car, similar vehicle, or train has been brought to his knowledge, nor shall such employee be held to have *contributed to his injury* in a case where the carrier violated any provisions of such sections, when such violations contributed to his death or injury."

Constitutional Provision.

"All courts shall be open, and every person, for an injury done him in his land, goods, person or reputation, shall have remedy by due course of law, and justice administered without denial or delay."
(See Const. of Ohio, 1802, art. 8, sec. 7.)

Special Verdict of Jury.

"At the time of the accident to plaintiff was the drawbar in such condition as necessitated plaintiff to line up the drawbar before a coupling could be made?

"Yes.

"F. N. BANKS, *Foreman.*"

[Endorsed:] In the Supreme Court of the United States, October term, 1914. No. 559. 559/24,303. Erie Railroad Company, plaintiff in error, vs. Joseph Solomon, defendant in error. In error to the Supreme Court of Ohio. Motion to dismiss, affirm, or transfer to summary docket, brief and partial transcript. Anderson, Mathews & Wall, attorneys-at-law, 608-9-10-11 Dollar Bank Building, Youngstown, Ohio.

[Endorsed:] File No. 24,303. Supreme Court U. S., October term, 1914. Term No. 559. Erie Railroad Co., pl'ff in error, vs. Joseph Solomon. Motion to dismiss or affirm or transfer to the summary docket, notice and proof of service of same. Filed November 16, 1914.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914

No. 559

ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JOSEPH SOLOMON, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF OHIO.

BRIEF OF DEFENDANT IN ERROR.

EMIL J. ANDERSON,
Of Youngstown, Ohio,
Attorney of Record for Defendant in Error.

INDEX

AUTHORITIES CITED:

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914

No. 559

ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JOSEPH SOLOMON, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF OHIO.

BRIEF OF DEFENDANT IN ERROR.

I.

STATEMENT

HISTORY

Joseph Solomon, at the January Term, A. D. 1912, of the Court of Common Pleas of Mahoning County, Ohio, recovered a judgment of $6500.00 against Erie Railroad Company, for personal injuries. The Circuit Court of Mahoning County affirmed this judgment; and the Supreme Court of Ohio, on the 28th day of October, A. D. 1913, affirmed the lower Courts, rendering final judgment.

A petition in error (R. 170) with an assignment of errors (R. 171-172) was duly filed; and a Writ of Error

from the Supreme Court of the United States to the Supreme Court of Ohio was allowed June 17th, A. D. 1914 (R. 173). On motion of plaintiff in error, an Entry of Certification was also allowed (R. 173-174).

Defendant filed his motion in this Court to Dismiss, Affirm or Transfer to Summary Docket; and the cause was ordered placed upon the Summary Docket for hearing upon the motion, as well as the merits.

NARRATIVE

Joseph Solomon, a railroad brakeman in the employ of plaintiff in error, lost his left foot while trying to couple a switch engine tender to a car standing on a track in the mill yard of the Carnegie Steel Company, at Youngstown, Ohio (R. 52). The car was loaded with steel billets (R. 52). It was not at that time to be made up into a train, but was simply to be hauled from one part of the mill yard to another (R. 52).

Injury occurred June 3rd, A. D. 1911—2:30 o'clock P. M. In the forenoon of that day, Solomon had to assist in making perhaps five different couplings with the tender in question (R. 13-48). At none of those times would it couple onto other cars automatically upon impact (R. 13-48), so that it became necessary in each instance for him either to open the knuckle by hand or, in railroad parlance, to "line it up" (R. 66-13-48). The operation known as lining it up was rendered necessary by reason of the great amount of lateral play in the draw bar and coupler. (R. 23-24-25.) It consisted in shoving or kicking the coupler into center so that it would squarely meet and couple with the couplers of other cars (R. 66-15-32). Not only was this necessary, but customary as well (R. 66-74-95-86-103, etc.).

Immediately before his injury, the switch engine stopped about a car length and a half from the car of

billets (R. 15-31). Solomon threw the switch, signalled the engine to back up, and mounted the footboard (R. 15-31). After some seconds he turned and saw the knuckle of the tender coupler was closed (R. 15-31). The knuckle on the car was in proper position—open (R. 15-31). He tried to open the knuckle of the tender coupler by jerking the cutting lever several times (R. 15-31). It failed to respond to the cutting lever (R. 15-31). He then discovered that the coupler was so far out of line with the coupler on the other car that it could not possibly couple (R. 16-31). Thereupon he tried to "line it up" with his foot (R. 16-31). His foot slipped and was crushed. (R. 15-16).

PLEADINGS

The following is an abstract from the first amended petition: (R. 5, 6.)

> Plaintiff says: Defendant company on said date caused and permitted said locomotive engine and tender number Seventy-five (75) to be hauled and used on said switch track; that the coupler on the rear of said tender—instead of coupling with other cars automatically upon impact, without the necessity of employes of defendant company going between the ends of said tender and cars—would not couple upon impact with the couplers of other cars, but was defective and inoperative in this, to-wit: That the draw-bar of said coupler had *such a degree of side play* that when it was pushed over to either side of the housing and hangers in which it was fastened it would not squarely meet the couplers of other cars, and would not couple with other cars automatically upon impact—so that it became and was necessary for employes to go in between the ends of said tender and cars to adjust or swing said draw-bar into position to couple with such other

cars; and that the knuckle, knuckle pin and lock of said coupler were so rusted, worn and battered that instead of operating freely in response to the cutting lever, operated from the side of said tender, they would bind to such an extent that said knuckle would not open sufficiently to couple with other cars automatically upon impact, but rendered it necessary for employes to go between said tender and cars to open said knuckle before such coupling could be made.

II.

ARGUMENT

Was the question of the railroad company's negligence one of *law only*, or was it a mixed question of law and fact? Was it not decided by the jury? Was not the weight of the evidence passed upon by the State Courts? And does the Supreme Court of the United States ever weigh the evidence?

Nevertheless, counsel for plaintiff in error try to resurrect that mixed question; and now ask this Court to hold—as a pure matter of law, that the railroad company was free from any negligence.

What reason is assigned why the findings of negligence by state courts and jury should be reversed?

Not only the reason, but their reasoning, as well, is found in their fifth assignment of error: (R. 171, 172.)

> "The Court erred in denying the claim specially set up and made by this plaintiff in error that under all the evidence in the case, and in the light of the special findings of fact returned by the jury, there was no negligence on the part of plaintiff in error, and that to sustain the verdict and the judgments of the lower courts would amount to the taking of property of this plaintiff in error without due process of law for the *reason*, as disclosed by the evidence, that the sideplay of two and one-half inches in the coupler in question

is necessary and is the standard recognized as used by railroads everywhere as well as by the Master Car Builders' Association, and it is impracticable, if not altogether impossible to operate a railroad without such amount of sideplay."

Has This Court Jurisdiction Under Sec. 709, Revised Statutes of the United States?

(a) We have already called attention to the jurisdictional question in our Motion to dismiss, etc., and now only wish to reiterate that no Federal Question is specially set up or claimed as required by the case of

Seaboard Airline Ry. vs. Duval, 225 U. S. 447.

(b) Counsel for plaintiff in error seems to find some comfort in the case of Chambers vs. B. & O., 207 U. S. 142, where the *opinion* of the State Court of last resort raised a Federal Question. There is no written opinion of the Supreme Court of Ohio in case at bar; so they rely in their brief upon the *certificate* of the Chief Justice of Ohio to make up any deficiency in the record. However, Mr. Justice Hughes held a contrary view in case of

Searboard Airline Ry. vs. Duval, 225 U. S. 447.
Also, L. & N. Ry. vs. Smith, 204 U. S. 551.

Now assuming that the specific Federal Question has been raised in the record, then we gladly consent to try this case on its merits. And we respectfully submit not only that the r e a s o n, but their reasoning disclosed in the foregoing assignment of error, are both untenable for the reasons following:

FIRST: It is true that the jury in a special finding of fact found that the knuckle on the coupler could be opened by means of the cutting lever from the side of the car; and we are therefore bound thereby, even though such finding was against the overwhelming weight of all the evidence. (R. 13, 15, 19, 22, 25, 28, 29, 35, 37, 38, 41, 43, 44, 45, 46, 47.)

However, there was another important defect specified in the first amended petition which prevented the coupler on the rear of the tender from coupling automatically upon impact, to-wit: (R. 6.)

> "That the draw-bar of said coupler had *such a degree of side play* that when it was pushed over to either side of the hangers in which it was fastened it would not squarely meet the couplers of other cars, and would not couple with other cars automatically upon impact, etc."

Upon that subject the trial court instructed the jury as follows: (R. 163.)

> "The plaintiff in this action seeks to recover not only upon the ground that the coupler and coupling apparatus, knuckle and pin was defective, but seeks to recover as well upon the ground that the draw-bar had an *unreasonable* amount of side play and I say to you as a matter of fact, if you shall find that the draw-bar in this action had an unreasonable amount of side play, because it is an admitted fact,

or if not an admitted fact the Court says to you as a matter of law that it must have had some side play."

However, upon that branch of the case the jury also rendered a special finding of fact which speaks for itself: (R. 11.)

Q. "At the time of the accident to plaintiff was the draw-bar in such condition as necessitated plaintiff to line up the draw-bar before a coupling could be made?"

"Yes."

"F. W. BANKS, *Foreman.*"

SECOND: Even a cursory examination of the record will show that their assertion that "there was no negligence * * * for the *reason* as disclosed by the evidence that the side play of *two* and *one-half* inches in the *coupler* is necessary" etc., is based not upon a fact, but an assumption.

For while the side play of the draw-bar may be 2½ inches at the hanger or collar, still the testimony is unanimous that the lateral swing of the *coupler* itself was about 4½ inches.

J. J. Herlihy: 4½ inches (R. 121).

Harry Reel: 4¼ inches (R. 45).

Joseph Solomon: 4¼ to 4½ inches (R. 36).

THIRD: Would this coupler with a lateral play of 4½ inches couple with other couplers automatically upon impact without the necessity of men going between the ends?

We beg leave to quote a few extracts from the testimony:

Cross-examination—Thomas Jenkins, conductor (R. 53).

Q. Assuming, Mr. Jenkins, that that draw-bar had any side play at the front end, so that the front end of the coupler would swing to the extent of

four and one-quarter to four and one-half inches, and assuming, Mr. Jenkins, that the draw-bar was pushed clear over to the extreme right or extreme left, and you were going to couple to a car on a straight track, and the draw-bar of the car is properly lined up, but the draw-bar of the tender four and one-half or four and one-quarter inches to the extreme right, would that couple automatically upon impact?

A. If it was to the extreme?

Q. Right or left?

A. No, sir, I don't suppose that it would.

Cross-examination—J. J. Herlihy (R. 120).

Q. I will agree with you when they are in line they will couple automatically upon impact, but assuming that one of the couplers is pushed over to the extreme right, then will it couple without adjustment?

A. It would not on a straight track.

D. J. McFadden (R. 66).

Q. There were times when you had to adjust it, is that what you call lining up, is that what you call lining?

A. Well, partly; yes, sir.

William Owens (R. 95).

Q. How would you move the draw head to the side?

A. Sometimes give it a kick, sometimes I would pul it in if it was convenient to do so.

George J. Johnson, Conductor (R. 86).

Q. If the draw-bar pushed clear over to one side on a straight track, would it make with the coupler on another car without having to be pushed back?

A. It might have been cut off when the car was on a curve and left clear over there and when you came onto a straight track you would have to

adjust it according to how you thought the knuckle stood.

Q. How would you do that?

A. Either pull it over with your hand or shove it over with your foot.

Q. Was there any way to do it from the side of the tank?

A. No, you would have to adjust it with your hand.

Q. So that there was no device or mechanism that you could do it with except by the hand or the foot?

A. On some draw-bars and couplers there is a spring that will throw them back.

Q. Was there any on 75?

A. I don't think there was.

Carl Shoaff (R. 103).

Q. No, on a straight track, if the draw-bar is pushed over to the extreme side, right side or left side, but the draw-bar on the other car is properly lined, on center, are you then able to make a coupling?

A. No, sir, I shouldn't think so.

FOURTH: Even in the face of the special findings of the jury and the overwhelming testimony in the record that the coupler in question would positively not couple with the couplers of other cars automatically upon impact without the necessity of men going between the ends thereof, still counsel for plaintiff in error tenaciously claim "that the sideplay of 2½ inches in the *coupler* in question is necessary, and is the standard recognized by railroads everywhere as well as by the Master Car Builders' Association."

(a) In discussing the standards is not the following testimony rather significant in case at bar?

Joseph Solomon (R. 27).

Q. I know it, but what I am asking you is this: Were you able to tell whether the coupler was made with that much side play or whether it worked to that size?

A. It worked to that size.

Q. I know; but this draw head I am asking you about, do you know that one was ever less than that?

A. Yes, sir, I could see up above. You can see where it is battered, for one thing, against the side of the lining of the collar.

(b) Was the sideplay in question of "the standard recognized as used by railroads everywhere"? Should not the testimony of their own Chief Master Car Builder be conclusive?

Cross-examination — John McMullen, Master Car Builder (R. 145).

Q. And you have built cars for a great number of years?

A. Yes, sir.

Q. Assuming that that went four and one-half inches, then what would you say was the cause?

A. As I said before, it couldn't. It couldn't go four and one-half inches with that two and one-half inch clearance.

Q. But supposing that it does go four and a half inches, then what could be the cause of such a swing as that?

A. Well, it couldn't go that. If it went that distance the engine or whatever it might be would be sent to the shop. It wouldn't be in use at all. It couldn't be used.

Q. Why not?

A. Why, it would be inoperative. Our inspectors working around that engine would send it to the shop.

Q. The coupler would be inoperative—it couldn't be coupled automatically?

A. We don't allow cars or engines to run when they don't couple.

FIFTH: But pray, tell who fixed this standard, for which they contend, of 2½ inches of side play in couplers? We must again quote from assignments of error. (R. 171.)

> "The side play of 2½ inches in the *coupler* in question is necessary and is the standard recognized as used by railroads everywhere as well as by the Master Car Builders' Association, etc."

What then is the Master Car Builders' Association; and with what powers is it invested?

Who is better qualified to tell us about this Association than their Expert, who later in his cross-examination testified that the coupler in question with a side-play of 4½ inches refused to couple automatically on impact? His testimony clearly reflects the attitude of counsel for plaintiff in error.

J. J. Herlihy (R. 112).

> "Master Car Builders rules on all cars in the United States. Master Car Builders is the head master mechanics and all builders from all of the roads in the country. They come together every year and make the rules governing the cars. Their rules are supposed to be *laws*. Whatever they make is supposed to govern all the cars throughout the country."

But we here again reaffirm that the standard to which couplers must conform has been fixed not by any Master Car Builders' Association, but by our National Congress; and that the true *test* is one of *coupling* automatically upon impact without the *necessitry* of men going between the ends.

Sec. 2. That on and after the first day of Jan-

> uary, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going betwen the ends of the cars.
>
> Public, No. 113, approved March 2, 1893, amended April 1, 1896.

The Interstate Commerce Commission has also ruled upon the standard of couplers on the rear of switch engine tenders, to-wit:

> "Couplers: Locomotives shall be equipped with *automatic couplers* at the rear of tender and front of locomotive."
>
> (Order Int. Com. Com. Act, Apr. 14, 1910, C. 160, 36 Stat. 298).

And in order to secure uniform laws the Legislature of the State of Ohio has also enacted the very same standard of couplers on tenders used in moving state traffic, to-wit:

> "No such common carrier shall haul, or permit to be hauled or used on its line, any locomotive, car, tender, or similar vehicle used in moving state traffic, not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." (Gen. Code of Ohio, Sec. 8950.)

III.

CONTRIBUTORY NEGLIGENCE

Our only reason for discussing this subject is that the typewritten brief just submitted by counsel for plaintiff in error appears contradictory. Toward the end they make the concession, to-wit:

> "We are not contending that contributory negligence of the defendant in error is a defense in this case, etc."

Yet at page ——— they give much consideration to the "carelessness of Solomon," and refer to a bulletin providing in substance that "no one shall go between cars for the purpose of opening knuckles unless the cars are at least ten feet apart." (R. 165.)

To this we answer.

(a) Solomon testified that no book of rules was ever furnished to him (R. 33).

And also that the bulletin had never been brought to his attention (R. 36). And their witness W. J. Rogers tells us that these bulletins were posted on a board fifty or sixty on top of one another (R. 96).

(b) Even if this bulletin or rule had been brought to Solomon's attention, does not the evidence conclusively show that their violation had existed for such a length of time that, even under the common law, the company would be deemed to have acquiesced therein? (R. 82, 84, 91, 108.)

See Dillon vs. Cin. Ry. Co., 89 Ohio State, 436.
Affirmed, 234 U. S., 753.
Seaboard Airline vs. Duval, 225 U. S. 477.
Southern Ry. vs. Carson, 194 U. S. 136, 148.
Southern Ry. vs. Bennett, 233 U. S. 80, 85.
Grand Trunk Ry. vs. Lindsay, 233 U. S. 42, 49.

(c) The common law doctrines of assumption of risk and contributory negligence have been abolished:

FEDERAL

Sec. 8. That any employe of any such common carrier who may be injured by any locomotive car, or train in use contrary to this Act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

(Public No. 113, Approved March 2, 1893, Amended April 1, 1896.)

"Provided that no such employe who may be injured or killed, shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

(Fed. Emp. Liability Act. Apr. 22, 1908, 149, Sec. 3, 35 Stat., page 585.)

Grand Trunk Ry. vs. Lindsay, 233 U. S. 42.

So. Ry. vs. Crockett, 234 U.S. 725

OHIO

Any employee of such common carrier, who is killed or injured by a locomotive, tender, car, similar vehicle or train, in use contrary to the provisions of sections eighty-nine hundred and forty-nine to eighty nine hundred and fifty-four, both inclusive, shall not be deemed to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, tender, car, similar vehicle, or train had been brought to his knowledge, nor shall such employee be held to have contributed to his injury in a case where the carrier violated any provision of such sections, when such violation contributed to his death or injury.

(Ohio Gen. Code, Sec. 8955.)

IV.

INTERPRETATION

It is urged not only that the Federal and Ohio Safety Appliance Acts are in themselves repugnant and unconstitutional, but that the interpretation thereof by the State Courts in the case at bar was unreasonable and harsh.

(a) The Federal Safety Appliance Act has been held constitutional by this Court, and the Federal and State Acts are not only almost identical in language, but absolutely conform in substance. How then can they be unconstitutional or repugnant?

(b) A settled construction in cases of injury by reason of hauling or using cars equipped with couplers that do not couple automatically upon impact without the necessity of men going between the ends, has, we feel, been given by our Federal Courts.

We content ourselves with a quotation from the opinion of Mr. Justice Moody, in St. L. & I. Mt. Ry. vs. Taylor, 210 U. S. 295:

> "The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it. It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body. It is said that the liability under the statute, as thus construed, imposes so great a hardship

upon the railroads that it ought not to be supposed that Congress intended it. Certainly the statute ought not to be given an absurd or utterly unreasonable interpretation leading to hardship and injustice, if any other interpretation is reasonably possible. But this argument is a dangerous one, and never should be heeded where the hardship would be occasional and exceptional. It would be better, it was once said by Lord Eldon, to look hardship in the face rather than break down the rules of law. But when applied to the case at bar the argument of hardship is plausible only when the a tention is directed to the material interest of the employer to the exclusion of the interests of the employee and of the public. Where an injury happens through the absence of a safe draw-bar there must be hardship."

On authority of the Taylor and other Federal cases the Supreme Court of the State of Ohio, has already construed the Safety Appliance Acts in a case almost identical to the case at bar as will be seen from the opinion delivered by Mr. Justice Price, in case of McGarvey vs. Ry. Co., 83 O. S. 291:

"So we have here a case where the *coupler* was loose on the carriers, and instead of having play of one or two inches laterally, the testimony tends to show, that by reason of wear, the lateral play was four or five inches, and that the coupling could not be made on that acute curve without the plaintiff going between the cars to render personal assistance."

(In case at bar it would not even couple on a straight track. R. 36, 95, 120, etc.)

We also take the liberty of quoting two paragraphs of the syllabus from the McGarvey case:

"By virture of Section two of an act entitled: 'An act to promote the safety of employes and travelers upon railroads,' etc., passed by the general

assembly of Ohio, March 19, 1906 (98 O. L., 75) it is the positive duty of a railway company to equip cars being used in moving state traffic, 'with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars,' and the use f such cars without the required equipment is unlawful."

"Where a railway company uses cars in moving state traffic, which are equipped with couplers intended, when installed, to couple automatically by impact, but from long use or other cause, they have become defective, worn and have such lateral play that they will not couple automatically by impact, and, to effect the coupling it became necessary for the employee to go between the cars to assist in making the same, and he is injured while so engaged because of the worn and defective couplers, he may recover for the injury so caused."

WHEREFORE, we respectfully submit that Congress and the Ohio Legislature alone possess authority to fix standards of couplers: that such a standard has been fixed by the Congress, the Interstate Commerce Commission and the Ohio Legislature: that our National and State Safety Appliance Acts are not only constitutional, but uniform and harmonious; that fair settled constructions have been given to these Statutes by the Supreme Court of the United States and the Supreme Court of the State of Ohio; that the question of the violation of Safety Appliance Acts in case at bar was a mixed question of law and fact; that the jury and the state courts decided that the tender in question was permitted to be hauled and used not equipped with a

coupler, *coupling* automatically upon impact without the necessity of men rendering direct bodily assistance; and that the verdict and judgments should be affirmed.

Respectfully,

EMIL J. ANDERSON,

Attorney of Record for Defendant in Error.

Received typewritten copy of brief from Emil J. Anderson, attorney for defendant in error, this 20th day of February, A. D. 1915.

C. D. HINE,

Attorney for Plaintiff in Error.

ERIE RAILROAD COMPANY *v.* SOLOMON.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 359. Argued February 24, 1915.—Decided May 10, 1915.

Writ of error to review the judgment of a state court, in an action for personal injuries based on the Safety Appliance Law of the State substantially identical with the Federal law, and affirmed by the intermediate appellate and the highest court of the State without opinion, dismissed for want of jurisdiction under § 237, Judicial Code.

Even if the highest court of the State, after affirmance, certified as part of the record the fact that it had been necessary to consider the Federal Safety Appliance Act and to determine whether the Ohio Safety Appliance Act, as construed by the trial court, is not repuguant to the Fourteenth Amendment, the Federal questions suggested as the basis for the writ of error in this case are so frivolous as not to afford jurisdiction under § 237, Judicial Code.

THE facts, which involve the construction and application of the Safety Appliance Act and the jurisdiction of this court under § 237, Judicial Code, are stated in the opinion.

Mr. Leroy Manchester, with whom *Mr. C. D. Hine* was on the brief, for plaintiff in error:

A right, privilege and immunity from liability was asserted and denied under the provisions of the Safety Appliance Act of the United States. The Federal Safety Appliance Act controls. The coupler satisfies the statute.

A right, privilege, and immunity from liability was asserted and denied under the Fourteenth Amendment.

In support of these contentions see *Atlantic Coast Line* v. *United States*, 168 Fed. Rep. 175; *Binns* v. *United States*, 194 U. S. 486, 495; *Church of Holy Trinity* v. *United States*, 143 U. S. 457, 463; *Chicago, M. & St. P. Ry.* v. *Voelker*, 129 Fed. Rep. 522; *C., B. & Q. R. R.* v.

United States, 211 Fed. Rep. 12; *Chicago &c. Ry. Co.* v. *Chicago*, 166 U. S. 226, 241; *Chicago, Milw. & St. P. R. R.* v. *United States*, 165 Fed. Rep. 423; *Coggs* v. *Bernard*, 2 Ld. Ray. 911; *Devine* v. *Chicago & C. R. R.* (Ill.), 102 N. E. Rep. 803; *Davidson* v. *New Orleans*, 96 U. S. 97, 102; *Fayerweather* v. *Ritch*, 195 U. S. 276; *Johnson* v. *So. Pac. Co.*, 196 U. S. 1; *Jacobson* v. *Massachusetts*, 197 U. S. 11; *Morris* v. *St. Louis S. W. Ry.* (Texas), 158 S. W. 1055; *Pennell* v. *Phila. & Reading R. R.*, 231 U. S. 675; *Smyth* v. *Ames*, 169 U. S. 466; *San Diego Land Co.* v. *National City*, 174 U. S. 739, 754; *St. Louis & I. Mtn. R. R.* v. *Taylor*, 210 U. S. 281; *Siegel* v. *N. Y. Cent. & H. R. R.*, 178 Fed. Rep. 873; *Southern Railway* v. *Crockett*, 234 U. S. 725; *United States* v. *Harris*, 177 U. S. 309; *Un. Pac. R. R.* v. *Brady*, 161 Fed. Rep. 719; *United States* v. *Erie R. R.*, 197 Fed. Rep. 287; *S. C.*, 212 Fed. Rep. 853; *United States* v. *Boston & Maine R. R.*, 168 Fed. Rep. 148; *United States* v. *Rio Grande Ry. Co.*, 174 Fed. Rep. 399; *United States* v. *Atchison, T. & S. F. Ry.*, 150 Fed. Rep. 442; *United States* v. *Illinois Cen. R. R. Co.*, 170 Fed. Rep. 542, 549; *United States* v. *Kirby*, 7 Wall. 482; *Wetmore* v. *Markoe*, 196 U. S. 68, 77.

This court has jurisdiction as Federal questions exist, and were properly raised.

A right, privilege, and immunity from liability was asserted and denied under the provisions of the Safety Appliance Act of March 2, 1893, c. 196, 27 Stat. 531; as amended by the act of March 2, 1903, 32 Stat. 943, 976; 16 Cyc., 861, and cases cited; *Southern Ry. Co.* v. *United States*, 222 U. S. 20.

A right, privilege, and immunity from liability was asserted and denied under the Fourteenth Amendment.

These Federal questions were properly raised. *Rector* v. *City Deposit Bank*, 200 U. S. 405, 412; *Chambers* v. *Balt. & Ohio R. R.*, 207 U. S. 142; *San Jose Land* v. *San Jose Ranch Co.*, 189 U. S. 177; *Haire* v. *Rice*, 204 U. S.

291; *Atchison, T. &c. R. R.* v. *Sowers*, 213 U. S. 55, 63; *Carlson* v. *Washington*, 234 U. S. 103; *Arkansas Southern Ry.* v. *German Bank*, 207 U. S. 270; *Furman* v. *Nichols*, 8 Wall. 44; *Crapo* v. *Kelly*, 16 Wall. 610; *Andrews* v. *Andrews*, 188 U. S. 14; *Pennywit* v. *Eaton*, 15 Wall. 380; *Louis. & Nash. R. R.* v. *Higdon*, 234 U. S. 592; *Mo. Pac. Ry. Co.* v. *Larabee*, 234 U. S. 459; *Western Turf Ass'n* v. *Greenburg*, 204 U. S. 359; *Ill. Cent. R. R.* v. *Chicago*, 176 U. S. 646; *Blythe* v. *Hinckley*, 180 U. S. 333; *Meyer* v. *Richmond*, 172 U. S. 82; *East Tenn. &c. Ry.* v. *Frazier*, 139 U. S. 288; *Home for Incurables* v. *New York*, 187 U. S. 155; *Eau Claire Bank* v. *Jackman*, 204 U. S. 522; *Hammond* v. *Whittredge*, 204 U. S. 538; *Nutt* v. *Knut*, 200 U. S. 12; *McCormick* v. *Market Bank*, 165 U. S. 538; *California Bank* v. *Kennedy*, 167 U. S. 362; *Ill. Cent. R. R.* v. *McKendree*, 203 U. S. 514; *St. Louis & I. M. Ry.* v. *Taylor*, 210 U. S. 281, 293; *Southern Ry.* v. *Crockett*, 234 U. S. 725; *Nor. Car. R. R.* v. *Zachary*, 232 U. S. 248; *Miedreich* v. *Lauenstein*, 232 U. S. 236; *Grannis* v. *Ordeau*, 234 U. S. 385; *International Harvester Co.* v. *Missouri*, 234 U. S. 199; *Louis. & Nash. R. R.* v. *Higdon*, 234 U. S. 592.

Mr. Emil J. Anderson for defendant in error.

Mr. Chief Justice White delivered the opinion of the court.

Solomon, the defendant in error, sued to recover for personal injuries suffered by him while he was working as a brakeman on a switch engine in the yard of the defendant company at Youngstown, Ohio. The negligence charged was that the tender of the engine had a defective coupler in that the knuckle and pin on the same could not be worked without going between the cars and that the draw-bar had so much side play that it would not meet the couplers of other cars and therefore would not

automatically couple by impact. The first defect may be put out of view as the jury found it did not exist. As to the second, the respective contentions at the trial were, on the part of the plaintiff, that the play of the draw-bar was so great as to cause the coupler to be defective, and on the part of the defendant, that while the draw-bar may have had some side play it only existed to the degree which was essential in such an appliance and therefore there was no defect. The trial court submitted the case to the jury on the theory that the coupler was defective if it had an unusual side play and conversely that it was not if it did not have such a degree of side play. From the pleadings and the course of the trial there is no room for dispute that the case was tried upon the theory that the right to recover was based on the Safety Appliance Law of Ohio, substantially identical in its terms with the Safety Appliance Law of the United States. The judgment on the verdict of the jury in favor of the plaintiff was affirmed without opinion by the Circuit Court and again affirmed without opinion by the Supreme Court of Ohio to which judgment the writ of error now before us was prosecuted.

Confining the case to the statement just made it is beyond dispute that there is no jurisdiction to review, but it is insisted that the case is not so confined because after affirmance the court below entered an order which it directed should be made part of the record certifying that in deciding the case it became necessary for it to consider whether the United States Safety Appliance Law was applicable and whether as construed by the trial court the state law if applicable was not repugnant to the due process clause of the Fourteenth Amendment. But assuming that the recited Federal questions are in the record and require consideration, they are so without merit and frivolous as not to give basis for jurisdiction: First, because such plainly is the result of the contention that error to

the prejudice of the defendant company concerning the United States Safety Appliance Law, if that law applied, was committed by instructing that it exacted a usual, that is, ordinary degree of care in the appliances to which that act related. And second, because a like view inevitably is necessary concerning the contention that the State Safety Appliance Law, if it applied, would be repugnant to the Fourteenth Amendment if it exacted a usual and ordinary degree of care. But this is not adequate to dispose of the case since the argument is that error as to the recited Federal question directly arose from the refusal of the court to instruct a verdict for the Railroad Company on the ground that there was no proof tending to show an unusual or any defect in the coupler, thereby permitting the jury to find a liability under the law of the United States where none existed, and under the theory of the application of the state law, causing such law to impose a liability for an appliance which was not defective, and hence to take property without due process of law. But while the proposition changes the form of the contention, it does not change the substance of things since we are of the opinion after an examination of the record that the contention that the case should have been taken from the jury on the ground stated is so wholly devoid of merit and wanting in substance as to afford no basis for jurisdiction. As a proposition which is unsubstantial and frivolous cannot be made substantial by asserting another proposition of the same character, it results that there is no ground for the exercise of jurisdiction and the writ of error is therefore

Dismissed for want of jurisdiction.